IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Respondent, v. RONALD BRUCE BIGGER, Petitioner.	)	Supreme Court No. CR-20-0383-PR Court of Appeals No. 2 CA-CR 2019-0012-PR Pima County Superior Court Cause No. CR-20043995-002

PETITIONER'S RESPONSE TO BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEY GENERAL

DAVID J. EUCHNER, State Bar # 21768
Pima County Public Defender's Office
33 N. Stone, 21st Floor
Tucson, Arizona 85701
Tel: (520) 724-6800
david.euchner@pima.gov

ATTORNEY FOR PETITIONER
RONALD BRUCE BIGGER

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INTRODUCTION

The Arizona Attorney General (AG), as *amicus curiae* in this case, agrees with some of Petitioner Bigger's contentions before this Court. For example, the AG agrees with Bigger that courts should not require a claim of ineffective assistance of counsel (IAC) to be supported by a standard-of-care expert, and the AG also agrees with Bigger that the court of appeals' attempt to reconcile A.R.S. § 13-4234(G) and Ariz. R. Crim. P. 32.4(b)(3)(D) fails because the two provisions are irreconcilable.

With regard to its position that "*Strickland*[1] expert" testimony should be *per se* inadmissible, the AG correctly notes that the trial court is presumed to know the standards, but then incorrectly turns it into an irrebuttable presumption, which should not apply in all cases. Most of all, the AG's proposed blanket rule would leave trial judges with no available option if the judge admits to not knowing the relevant standard of practice and asks for more evidence.

The AG's deep dive into the legislative history of the 1992 statutory and rule changes, while purporting to be a comprehensive history of the relevant statutes and rules, falls well short of the mark. Moreover, but it ignores three foundational points. First, the intent of the drafters to create "substantive" "jurisdictional" rules in the statutes and "substantive rights" in the rules does not make it so. Second, the AG altogether fails to cite the landmark opinion in this area, *State v. Birmingham*, 96

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

Ariz. 109 (1964), as well as this Court's most recent opinion in *State v. Reed*, 248 Ariz. 72 (2020), both of which control this issue. The final point is that in our tripartite system of government, "'[i]t is emphatically the province and duty of the judicial department to say what the law is,' and constitutional interpretation 'is of the very essence of judicial duty.'" *State v. Maestas*, 244 Ariz. 9, 15-16 ¶ 29, 417 P.3d 774, 780-81 (2018) (Bolick, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. 137, 177-78, 1 Cranch 137 (1803)). The AG would have this Court not only neglect its constitutional duty to exercise rulemaking authority but also ignore the many times when it struck down statutes that invaded the rulemaking province. Thus, even if this Court could find its own rules unconstitutional where neither party has asked for such,[2] it should not do so because the AG is wrong as a matter of state constitutional law.

ARGUMENTS

I. *Strickland* experts are rarely necessary, but the AG's blanket rule that they are irrelevant is too extreme a solution.

The AG agrees with Bigger insofar as Bigger has asked for this Court to hold that a *Strickland* expert is unnecessary. The AG goes further than Bigger, however, by asserting that such testimony "is irrelevant as a matter of law to establish the

[2] "[A]mici curiae … have no right to create, extend or enlarge the issues." *Bristor v. Cheatham*, 75 Ariz. 227, 230 (1953); *see also Cave Creek Unified School Dist. v. Ducey*, 233 Ariz. 1, 4 n.2 (2013). The AG seems to recognize this and does not ask for this Court to deny Bigger his day in court. AG Brief at 8 n.3.

prevailing professional norms for an IAC claim because deficient performance is a legal question for the court." AG Brief at 2-3. To the contrary, the Supreme Court clearly has stated that the issue is a mixed question of fact and law. Petitioner's Supp Brief at 18 (quoting *Strickland*, 466 U.S. at 698).

With regard to the factual questions related to prevailing professional norms,[3] the AG asserts that "PCR courts are well-aware of those norms." This is a bold and over-inclusive statement with which many judges might disagree. Even an experienced trial judge who has presided over numerous criminal trials would not necessarily know what it is like to investigate or prepare a defense—particularly in capital proceedings—or to have attorney-client communications with a criminal defendant. When presenting a claim of ineffective assistance of appellate counsel to a trial judge who has never filed a brief in an appellate court, it is hard to say that the

[3] The AG Brief points out that Bigger often refers to a "standard of care" while *Strickland* uses the language of "prevailing professional norms." AG Brief at 2 n.1. The AG is correct to point this out; although Bigger has consistently cited the correct standard and never used the term "standard of care" until his motion for reconsideration in the court of appeals—in part because he quoted Ninth Circuit cases that used the term. Motion for Reconsideration at 4-5 (quoting *Heishman v. Ayers*, 621 F.3d 1030, 1042 (9th Cir. 2010); *LaGrand v. Stewart*, 133 F.3d 1253, 1270 n.8 (9th Cir. 1998).

Bigger's argument that there is a functional difference between an IAC claim and a claim of attorney negligence, Petitioner Supp Brief at 5-6, is not served by using "standard of care" interchangeably with "prevailing professional norms." Equating the two terms might suggest that the two types of claims are not so distinguishable. Bigger acknowledges that the terms should not be interchangeable and that "standard of care" should be used only for legal malpractice claims.

judge is independently aware of professional norms for appellate practice. See Petitioner Supp Brief at 7 n.5.

On the other hand, because "trial judges are presumed to know the law and to apply it in making their decisions," *State v. Trostle*, 191 Ariz. 4, 22 (1997), defendants should not start from a position of assuming that a *Strickland* expert's opinion is necessary to make a successful claim. Instead, the standard should be that a *Strickland* expert is never required at the petition stage, but if a trial judge believes one is necessary to help the court evaluate the claim, then the court should ask the parties to present such evidence at the hearing. *See* Petitioner Supp Brief at 7-8.

The AG does not cite this Court's opinion in *State v. Miller*, CR-19-0061-PC, 2021 WL 1783111 (Ariz., May 4, 2021), in which this Court held that an attorney did not fall below prevailing norms by failing to object to an erroneous jury instruction that was in the pattern instructions adopted by the State Bar's Criminal Jury Instructions Committee. This Court noted: "Miller pointed only to the RAJI's error as proof of counsel's deficiency. He did not provide any evidence, such as affidavits from other defense counsel, suggesting his lawyers' failure to challenge the RAJI fell below professional norms established by the legal community." *Id.* ¶ 12. Four paragraphs later, this Court repeated: "Miller did not present any affidavits or other evidence suggesting that the criminal defense attorney community had questioned the RAJI at the time of Miller's trial and appeal." *Id.* ¶ 16. *Miller* thus

demonstrates that testimony from a *Strickland* expert is admissible and does not necessarily intrude upon the court's role in deciding the issue.

What *Miller* does not explain is when counsel's duty to supply a *Strickland* expert should arise, or if it should at all. Bigger reads *Miller* as permitting a defendant to submit such an opinion in support of a claim, particularly in order to explain that the attorney's performance was not consistent with prevailing norms but in fact fell below them. It also appears from *Miller* that the defendant did not seek to offer testimony at an evidentiary hearing but rather submitted on the pleadings. Unlike *Miller*, however, Bigger was entirely denied any opportunity to present testimony at an evidentiary hearing.

The claim in *Miller* was unusual because it involved a finding of IAC where trial counsel accepted a pattern instruction and there was no evidence that trial counsel acted any differently than all other attorneys at the time of trial. *See May v. Ryan*, 807 Fed. App'x 632, 634-35 (9th Cir. 2020) ("Given the long-standing Arizona rule that the State is not required to prove sexual intent to successfully prosecute a defendant for child molestation, which provided the background for the 'prevailing professional practice at the time of the trial,' we cannot conclude that trial counsel's failure to object to the constitutionality of the statute's placing the burden of proving lack of intent on the defendant fell below an objective standard of reasonableness.") (internal citations and quotations omitted). Even so, this Court

acknowledged that it is possible that the standard practice fell below prevailing norms. *Miller*, 2021 WL 1783111, ¶ 16 (citing *Wade v. Brockamp*, 342 P.3d 142, 152 (Or. App. 2015)); *see also State v. Shrum*, 220 Ariz. 115, 120 ¶ 22 (2009) ("such a misunderstanding of the law on the part of some lawyers conceivably might support claims for ineffective assistance of counsel…").

Bigger's claim, on the other hand, is fundamentally different: that trial counsel fell below prevailing norms by failing to properly research the law or learn the facts of the case and by making strategic decisions that were so objectively unreasonable that even law students would know better. In a case like ours, the AG is right that a *Strickland* expert provides no additional value.

II. Because the hearing and issuance of post-conviction remedies is essentially a judicial function, A.R.S. § 13-4234(G) is plainly procedural and an encroachment on this Court's rulemaking authority.

The AG correctly argues that A.R.S. § 13-4234(G) is in direct conflict with Rule 32.4(b)(3)(D) and thus both cannot stand. The AG agrees with Bigger that separation of powers is implicated. The problem with the AG's analysis is that it concentrates almost exclusively on the legislative history of a committee's work in 1991-1992, at the expense of this Court's precedent on separation of powers and the history of post-conviction relief (PCR) proceedings. Its implied premise that time limits are substantive laws, AG Brief at 13-14, is based on a mistaken view that Rule 32 (and now Rule 33) tracks Article 29, when history shows that the opposite is true.

A. History of PCR.

This Court adopted Rule 32 in 1975. Included was Rule 32.3, explicitly stating that the PCR process "displaces all post-trial remedies except post-trial motions, appeal and *habeas corpus*." The 2020 version of Rule 32.3 has stylistic differences but maintains that courts should treat all motions or petitions for common law writs as a PCR petition. Rule 32.3(b) (Rev. 2020).

The PCR rules were created as a replacement for common-law writs that the judiciary has always had power to issue. Although the Rule specifically refers to *habeas corpus*, more apropos is *coram nobis* since *habeas corpus* is a claim that one's detention is unlawful while *coram nobis* attacks the validity of the conviction and is filed in the court where the conviction was obtained. *See* Brian R. Means, *Postconviction Remedies* § 3:2 (July 2020 update). In *United States v. Morgan*, 346 U.S. 502, 506-12 (1954), the U.S. Supreme Court described the history of the writ of *coram nobis* and held that federal courts had authority to issue such writs under the "all-writs section" of the federal judicial code. This Court found authority within article 6, section 5(4) of the Arizona Constitution for issuing a writ of *coram nobis* "to raise on appeal the question whether appellants were denied the effective assistance of counsel under the Sixth Amendment to the Constitution of the United States," and to return the case to the superior court for a hearing on the issues. *State v. Kruchten*, 101 Ariz. 186, 189-90 (1966).

This Court's territorial predecessor explained the practice of replacing common law writs with modern practices such as motions to the court:

> The office of the ancient remedy of a writ of error coram nobis was to have a judgment corrected by an examination, by the court rendering it, into some question of fact affecting the validity and regularity of the proceedings…and which was not made an issue and determined in the action. No error of a court in applying the law to the facts could be rectified by means of the writ, nor could any error of fact which was adjudicated in the action be reviewed. The writ has become obsolete, having been superseded by the modern practice of applying to the court by motion for the relief sought. We are not disposed to encourage the digging into the moldering dust heaps of the past for worn-out and discarded remedies, or to sanction in the future the practice of applying to this court in this manner for relief, which can more speedily and as efficaciously be had by the simple remedy of motion. We have, however, in the present instance, chosen to consider the application for the writ as though it was a motion to vacate the judgment, upon those facts which could have been reviewable under the writ of coram nobis.

Billups v. Freeman, 5 Ariz. 268, 271 (1898) (internal citations omitted). Prior to 1975, when no regular rule yet existed, this Court entertained petitions for *coram nobis* writs. *E.g.*, *Kruchten*, *supra*; *Maxwell v. State*, 106 Ariz. 527 (1971); *State v. Griswold*, 105 Ariz. 1 (1969); *State v. Urbano*, 105 Ariz. 13 (1969). The common sense reason for preferring a regular process (Rule 32) to use of common-law writs is plain: regularity breeds consistency and reliability in application of rules.

In 1984, the Legislature adopted Article 29 of Title 13, A.R.S. §§ 13-4231 et. seq., which was copied almost verbatim from Rule 32. *See* AG Appendix, ep 129 (H.B. 2328 "puts into the statutes Rule 32 (Rules of Criminal Procedure) in its entirety."). The Legislature did not even try to limit itself to arguably substantive

issues; it even copied provisions such as how the court may hold a prehearing conference. *Compare* § 13-4237, *with* Rule 32.7 (Rev. 1984). One example of a difference was the addition of deadlines for filing a petition; whereas Rule 32.4(a) stated "[a] petition may be filed at any time after entry of judgment and sentence," § 13-4234(A)(4) included: "a petition may not be filed later than one year from the date of the mandate of the appeals court affirming petitioner's conviction"—a provision that was struck down in *State v. Fowler*, 156 Ariz. 408, 411-12 (App. 1987), and *State v. Bejarano*, 158 Ariz. 253, 254 (1988). Notably, no such statutes were ever adopted for direct appeals.

The 1992 changes to the PCR rules and Article 29 arose from a Post-Conviction Relief Study Committee whose members were appointed by legislative leaders, the Governor, the Chief Justice, and the State Bar president. AG Appendix, ep 9 (listing members). The Study Committee first recommended:

> **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**

Id., ep 11 (emphasis in original). While the recommendations discuss "substantive issues," *id*., the Study Committee recommended that the corresponding provisions of Article 29 and Rule 32 continue to use the same language. *Id*., ep 13-20. Some of the work produced by the Study Committee was plainly legislative in nature, such

as the call for "the establishment of a post-trial Statewide public defender's office." *Id*., ep 12. The fact that the Study Committee invoked the terms "substantive" and "procedural" is of little value here since it used identical verbiage for both statutes and rules without any attempt to distinguish what was "substantive" and what was "procedural."

B. Separation of powers and this Court's rulemaking authority.

Article 3 of the Arizona Constitution creates the three branches of government and states: "such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." "The Arizona Constitution, written after generations of experience and experimentation under the United States Constitution, spells out the separation of powers doctrine even more specifically than does the national document." *State ex rel. Woods v. Block*, 189 Ariz. 269, 275 (1997). "Nowhere in the United States is this system of structured liberty more explicitly and firmly expressed than in Arizona." *Mecham v. Gordon*, 156 Ariz. 297, 300 (1988).

Despite this explicit constitutional provision, "[t]he separation of powers does not require a 'hermetic sealing off' of the three branches of government." *State v. Prentiss*, 163 Ariz. 81, 84 (1989). Rather, the powers of the three branches of government, may be "blended" permissibly, so long as the result is not an outright usurpation of the powers of one branch by another. *Block*, 189 Ariz. at 276 (citing

J.W. Hancock Enters. v. Registrar of Contractors, 142 Ariz. 400, 405-06 (App. 1984)). This Court approved the four-factor test, first adopted in *Hancock*, for determining whether a separation of powers violation has occurred: "the 'essential nature' of the powers being exercised, 'the degree of control by the legislative department in the exercise of the power,' the objective of the Legislature, and the practical consequences of the action, if available." *Block*, 189 Ariz. at 276 (quoting *State ex rel. Schneider v. Bennett*, 547 P.2d 786, 792 (Kan. 1976)). This Court agreed that "the test provides 'the necessary flexibility to government,' yet 'preserves the essential goal of the separation of powers theory,' to prevent 'the concentration of the whole power of two or more branches in one body.'" *Id*. (quoting *Hancock*, 142 Ariz. at 406).

Applying this test to the statute and rule at issue, it is readily apparent that the legislature has intruded into a judicial function and not the other way around. First, the "essential nature of the powers being exercised" is the procedure for initiating PCR proceedings—an inherently judicial function. Second, although the Legislature by its own admission was merely adopting the language of Rule 32 into the statutes, by using different language in certain places it was clearly intending to exert control over the judicial branch. Third, the Legislature's objective was to place burdens on the judicial branch's ability to hear PCRs. Finally, the practical consequences of any action taken pursuant to the statute is that it would deprive a criminal defendant of

the opportunity to be heard in court when the judicial branch finds that the defendant has a procedural right to be heard.

The only reason why criminal defendants have not been harmed by Article 29 limitations is simple: every time the issue has been raised—in *Fowler*, *Bejarano*, and *State ex rel. Napolitano v. Brown*, 194 Ariz. 340 (1999)—the statute at issue was found unconstitutional. Even in *State v. Mata*, 185 Ariz. 319, 333 (1996), this Court referred to the defendant's noncompliance with § 13-4234(F), without citing the identical language in Rule 32.4(f) (Rev. 1996). Throughout that section of the opinion, *Mata* cited both the PCR statutes and PCR rules. 185 Ariz. at 332.

The fact that A.R.S. § 13-4234(G) purports to limit the jurisdiction of the court is not dispositive. This Court has recognized that the deadline for filing a notice of appeal is jurisdictional—yet no one seems to dispute that that deadline is a procedural rule. *See State v. Whitman*, 234 Ariz. 565 (2014) (dismissal of appeal necessary when notice of appeal was untimely). Moreover, the statement of the body that creates the law cannot be the controlling fact on whether it is substantive or procedural. Otherwise, the Legislature could pass a law that says, "The parties have a substantive right to receive opposing motions that do not exceed 11 pages," notwithstanding the court's authority to grant page-limit extensions. Or this Court could adopt a rule that says, "as a matter of procedure, the State may not bring a prosecution for any offense more than three years after its commission," and in so

doing override § 13-107. Invoking the magic words "substantive" or "procedural" does not make it so.

This Court has always been wary of crossing into the provinces of the legislative and executive branches. Long ago, this Court rebuffed a request for an injunction from application of a statute to an industry because "[t]he courts are not interested in the question as to the wisdom of such regulation, but only whether the regulation runs contrary to constitutional guaranties, and whether it is arbitrary and unreasonable." *Francis v. Allen*, 54 Ariz. 377, 381 (1939). And it rejected the Governor's invitation to exercise legislative power in *Mecham*, recognizing that use of the word "trial" did not necessarily invoke judicial power. On the other hand, this Court has refused to be run off the road just because the AG calls "political question." *E.g.*, *Maestas*, 244 Ariz. at 11-12 ¶¶ 7-12. Article 29 is a textbook example of the Legislature invading the province of the judiciary and then trying to claim the rulemaking authority for itself. As it has done many times before, this Court can push back against the political branches' attempt to usurp its rulemaking authority.

The courts' practice of striking down only those statutes and provisions that engulf and conflict with this Court's procedural rules cannot be found in the text of Article 3 but instead is a prudential doctrine. That doctrine seeks to show proper respect for the political branches; to an extent, it even writes into law the concept

that "the judiciary is beyond comparison the weakest of the three departments of power." The Federalist, No. 78. But striking down Article 29 in a piecemeal fashion, if anything, has emboldened the political branches. How else could the AG assert not only that *Fowler* and *Bejarano* and *Brown* do not "make such a sweeping conclusion" to strike down unconstitutional time limits, but even go so far as to say that when this Court modifies Rule 32 to allow untimely notices, it is actually encroaching on the Legislature's right to pass substantive laws? AG Brief at 14-18.

This Court should strike down the entirety of Article 29. To the extent that it is consistent with (or identical to) Rules 32 and 33, it is superfluous and unnecessary. To the extent it conflicts with the Rules, it is unconstitutional. Either way, Article 29 is entirely useless. Not only is such a strong step appropriate, but it is necessary to remind the political branches not to encroach on the judiciary's rulemaking power.

C. <u>The VBR did not authorize any of the statutes in Article 29.</u>

The AG correctly notes that the Victim's Bill of Rights vested the Legislature with the constitutional authority to make rules to give effect to the VBR. But this Court has held that the VBR was not a Trojan horse that allowed the legislature to hijack this Court's general rulemaking authority; on the contrary, a limited view of the authority vested in the legislature by the VBR was necessary in order to maintain its constitutionality. *Slayton v. Shunway*, 166 Ariz. 87, 91-92 (1990). This limitation on the VBR's rulemaking authorization was recognized in *Champlin v. Sargeant*,

192 Ariz. 371, 373 n.2 (1998), again in *Brown*, 192 Ariz. at 343 ¶ 11, and most recently in *Reed*, 248 Ariz. at 78 ¶ 20. Bigger's case is no different from *Reed*, 248 Ariz. at 79 ¶ 23, in that A.R.S. § 13-4234(G) is a general procedural rule that purports to apply to all cases regardless of whether there is a victim.

The AG is wrong to say that "[t]he statutory time limits set forth in § 13-4234 were specifically enacted to further the goals set forth in the VBR." First, the Legislature was enacting time limits within Article 29 as early as 1984, before the VBR's passage in 1990, and those were struck down in *Fowler* and *Bejarano*. Even if the AG were correct that some legislators invoked the VBR when asking for passage of certain statutes, AG Brief at 19, nowhere does the AG quote the relevant language from *Brown*, nor does the AG even mention *Reed*.

CONCLUSION

The jurisdictional issue in this case is a classic example of the sideshow taking over the circus. This Court has repeatedly and consistently held that the mechanism for hearing and deciding appeals and PCRs is procedural and that legislative encroachments into the domain of this Court's rulemaking authority violate separation of powers. This Court should do so again. Nothing more needs to be said on this issue; "[t]hat should be the end of the matter." *Blakely v. Washington*, 542 U.S. 296, 313 (2004).

Regarding the IAC issue, the AG Brief shows that the lower court decisions in this case are unsustainable because they relied upon the trial court's requirement that Bigger must produce a *Strickland* expert in order to make a colorable claim. Rather than accept the AG's broad rule for irrelevancy of such evidence, however, Bigger asks this Court to strike a more nuanced balance and find that there is a time and a place for a *Strickland* expert, as stated in his Supplemental Brief.

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Law Offices
Pima County Public Defender

By :/s/ David J. Euchner
DAVID J. EUCHNER
Attorney for Ronald Bruce Bigger