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 SUPPLEMENTAL BRIEF

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ISSUES PRESENTED ON REVIEW

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?

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INTRODUCTION

Since *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Lee*, 142 Ariz. 210 (1984), both the U.S. Supreme Court and this Court have consistently held that the standard for finding ineffective assistance of counsel (IAC) is one of objective reasonableness. Yet in Bruce Bigger's case, both the trial court and the court of appeals (COA) watered down this objective test with contextless quotes to scattered cases that, when read together, suggest a different standard. The trial court clearly stated that Bigger's IAC claims were not colorable because trial counsel might have been pursuing a strategy and because Bigger did not provide a standard-of-care expert. Bigger's *amici* agree that the manner in which the COA upheld the trial court's standard is indecipherable.[1]

A second, independent reason to grant a hearing to Bigger is the denial of a jury instruction on identification.[2] The COA's attempt to walk back its earlier holding in *State v. Nottingham*, 231 Ariz. 21 (App. 2012), that Arizona law was modified by *Perry v. New Hampshire*, 565 U.S. 228 (2012), is unsustainable. As *Perry* is now nine years old and cannot be applied retroactively to cases on collateral

[1] Brief of AACJ at 5 (COA opinion is inconsistent and unclear and "creat[es] a grave risk of uncertainty…"); Brief of APDA at 1 ("The opinion below arguably created a new requirement that IAC claims must be supported by a standard of care expert at the petition stage.").

[2] State Bar of Arizona, *Revised Arizona Jury Instructions* (Criminal) ("RAJI") Std. 45 (5th ed. Rev. 2019). This instruction was formerly Standard 39.

review, no other post-conviction petitioner will derive any benefit from *Perry*. *See Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) (addressing concerns about opening "floodgates" for cases already final on appeal). The identification issue was critical in this case, and Bigger can prove prejudice at an evidentiary hearing.

This Court should clarify two other points of law for the benefit of lower courts. First, it should explicitly hold that trial courts always have jurisdiction to hear post-conviction claims and that the ***preclusion*** of untimely claims does not impact the court's ***jurisdiction***. Second, this Court should clarify the standard of appellate review when a trial court dismisses a PCR petition without an evidentiary hearing is *de novo* and not abuse of discretion. PCR courts should be erring in favor of granting evidentiary hearings, not denying them.

ARGUMENTS

I. *Strickland* requires courts to review IAC claims against a standard of objective reasonableness and not any particular kind of evidence.

A. *Strickland* requires objective reasonableness.

"It is all too tempting for a defendant to second-guess counsel's assistance after conviction..., and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S at 689. Bigger has avoided this temptation and raised only IAC claims that meet *Strickland*'s high standard. As stated in the Petition for Review, the COA converted *Strickland*'s rule that trial counsel's

strategic decisions are "virtually unchallengeable" into an insurmountable standard.[3] Perhaps this error resulted from the fact that no published Arizona case has held that a trial attorney's strategic decision, made after a full investigation, was objectively unreasonable. Other jurisdictions[4] have identified circumstances where trial counsel's tactical decisions were found to have violated *Strickland,* even though the decisions were far more reasonable than trial counsel's decision here to point the finger at Schwartz as the killer.

The Third Circuit recognizes a "tiered structure with respect to *Strickland*'s strategic presumptions." *Thomas v. Varner*, 428 F.3d 491, 499 (3d Cir. 2005). First there is a "weak" presumption "that counsel's conduct might have been part of a sound strategy," rebutted "by showing either that the conduct was not, in fact, part of a strategy or by showing that the strategy employed was unsound." *Id*. at 499-

[3] *Cf. Phoenix v. Matesanz*, 233 F.3d 77, 82 n.2 (1st Cir. 2000) ("We should note that "*virtually* unchallengeable" does differ from "unchallengeable." . . . . [T]he Supreme Court cited with approval the Court of Appeals approach to strategic decision-making, which had in fact allowed challenges when 'the choice was so patently unreasonable that no competent attorney would have made it.' *Washington v. Strickland*, 693 F.2d 1243, 1254 (5th Cir. 1982).").

[4] It is important to note that while state and federal courts apply *Strickland* equally, a federal court reviewing a state court decision applies the heightened standard as required by 28 U.S.C. § 2254(d)(1) (commonly known as AEDPA). AEDPA requires a habeas petitioner to prove that the state court ruling not only violated clear U.S. Supreme Court precedent at the time of the ruling, but also that the state court ruling was unjustifiable and "beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This Court, however, conducts *de novo* review of the lower court rulings on such issues. *See State v. Denz*, 232 Ariz. 441, 446 ¶ 15 (App. 2013).

500. "[I]f the [State] can show that counsel actually pursued an informed strategy (one decided upon after a thorough investigation of the relevant law and facts), the 'weak' presumption becomes a 'strong' presumption, which is 'virtually unchallengeable.'" *Id*. at 500. Having failed to identify a strategy that was supported by the decision not to file a motion to suppress a pretrial identification, the Third Circuit found that the "weak presumption" was effectively rebutted. *Id*. at 501-02. Following *Varner*, the D.C. Circuit found that a trial attorney, aware of a new law about to take effect that would benefit his client's sentence, had no objectively reasonable basis for failing to ask for a continuance of his client's sentencing. *United States v. Abney*, 812 F.3d 1079, 1091-93 (D.C. Cir. 2016).

The Tenth Circuit has similarly recognized that the presumption against deficient performance is stronger where trial counsel's strategy has the benefit of a full investigation of facts and law:

> Unlike the general presumption that an attorney acted objectively reasonably because his decision might have been made for legitimate strategic reasons, which automatically applies in all cases, this second, "virtually unchallengeable" presumption of reasonableness operates only where it is shown (1) that counsel made a strategic decision and (2) that the decision was adequately informed.

Bullock v. Carver, 297 F.3d 1036, 1047 (10th Cir. 2002). "[E]ven where an attorney pursued a particular course of action for strategic reasons, courts still consider whether that course of action was objectively reasonable, notwithstanding *Strickland*'s strong presumption in favor of upholding strategic decisions." *Id*. at

1048. *See also Moore v. Marr*, 254 F.3d 1235, 1239 (10th Cir. 2001) ("Strategic or tactical decisions on the part of counsel are presumed correct, unless they were completely unreasonable, not merely wrong.").

This Court should adopt *Varner*'s "tiered structure" because it is sensible and easy to apply. It first requires the court to assess whether trial counsel's decision was based on a full investigation of facts and law—and if it was not, then the challenged decision is entitled to no deference. If it is unknown whether there was a strategy, then there is a "weak presumption" that the decision was part of a strategy, which a petitioner can rebut by showing that any possible strategy was unsound—not as high a standard as "virtually unchallengeable," but higher than merely second-guessing trial counsel with 20/20 hindsight. If trial counsel's decision was based on a full investigation of the facts and applicable law and served an overarching strategy, then it will be a rare case where a petitioner can overcome the "strong presumption" of competence. At every step of this analysis, the court must assess trial counsel's decisions against a standard of objective reasonableness.

B. <u>While a standard-of-care expert can assist the court in evaluating a *Strickland* claim, a petitioner need not proffer such an expert to state a colorable claim.</u>

By requiring a PCR petitioner to provide an opinion on the standard of care for a criminal defense attorney in a PCR proceeding (often called a "*Strickland* expert"), the trial court failed to appreciate that the nature of a PCR claim is not a negligence claim. The focus in PCR is not on the lawyer, but on the defendant's right

to a fair trial. "The object of an ineffectiveness claim is not to grade counsel's performance." *Strickland*, 466 U.S. at 697. "Although a Rule 32 proceeding and a subsequent [ ] proceeding may share the same universe of facts," *In re Wolfram*, 174 Ariz. 49, 53-54 (1993), they require different standards altogether.

The parties disagree whether the COA's opinion created a requirement that a PCR petitioner generally must support IAC claims with a *Strickland* expert, but it is undeniable that the trial court imposed such a requirement. This Court should provide the following standard to guide lower courts.

First, the petitioner is never required to offer a *Strickland* expert, because *Strickland*'s objective-reasonableness standard requires the PCR court to review trial counsel's performance and decisions. This is true whether evaluating a petition for a colorable claim or viewing the evidence presented at an evidentiary hearing. As the Eleventh Circuit explained:

> There is another more fundamental reason why Provenzano is not entitled to an evidentiary hearing on the reasonableness of his counsel's decision to forego a change of venue, regardless of any affidavit he may have proffered. … [T]he reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof. Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

Provenzano v. Singletary, 148 F.3d 1327, 1332 (11th Cir. 1998).

Second, even though a *Strickland* expert is not necessary to state a colorable claim, a petitioner may nevertheless choose to support a claim with an opinion from a *Strickland* expert, either in the petition or at an evidentiary hearing. The practice in Arizona is to use *Strickland* experts in capital cases, *e.g.*, *State v. Pandeli*, 242 Ariz. 175, 189 ¶ 56 (2017), because the imposition of the ultimate punishment requires heightened standards that are not necessarily understood by trial judges. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003); Ariz. R. Crim. P. 6.8. *See also Allison v. Ayers*, 2008 WL 5274580, *1 (C.D. Cal. 2008) (unpublished) (citing *Wiggins* and noting "the use of *Strickland* experts, especially in capital habeas cases, is well-established"). In non-capital cases, attorneys sometimes decide that a *Strickland* expert may help explain a particular claim.[5] This is not unlike the State choosing to present additional expert evidence to support its proof in a criminal trial, even though such evidence is not necessary for the case to survive a motion for judgment of acquittal. Ariz. R. Crim. P. 20(a).

Third, to the extent that a trial judge lacks necessary factual information to assess the IAC claim, it is incumbent on the judge to say something and ask the parties to offer a *Strickland* expert. The law presumes that the judge knows the standards of practice, and thus with most IAC claims offering a *Strickland* expert

[5] For example, in Pima County, it is common for a *Strickland* expert to be used to support a claim of ineffective representation on appeal, since few trial judges have experience in criminal appellate practice.

borders on insulting the judge's intelligence. Leaving defendants guessing whether a case requires a *Strickland* expert encourages the waste of resources that the APDA *amicus* brief addressed. If an unusual circumstance arises and the trial judge believes he or she would benefit from additional information, then the judge can ask the parties to provide a *Strickland* expert, or appoint one if necessary.

Fourth, this Court should clarify the extent to which a *Strickland* expert may testify. In Arizona, "[a]n opinion is not objectionable just because it embraces an ultimate issue." Ariz. R. Evid. 704(a). This rule prevents an expert from opining on a defendant's guilt, *Fuenning v. Superior Court*, 139 Ariz. 590, 605 (1983), or on the credibility of a witness, *State v. Lindsey*, 149 Ariz. 472, 475 (1986), and thus a *Strickland* expert cannot opine that the defendant satisfied the first *Strickland* prong. But a *Strickland* expert could identify prevailing norms for criminal defense lawyers and opine that a particular action (or inaction) fell below those norms.

Finally, a *Strickland* expert rarely will do more than tip the balance in a close case. If a claim is close enough that the court thinks a *Strickland* expert would help, then the claim is colorable. It cannot be said enough that the lower courts did not decide Bigger's case after hearing testimony about the reasons for trial counsel's decisions—they decided that Bigger was not even entitled to present evidence that his trial counsel's actions were objectively unreasonable at an evidentiary hearing and summarily dismissed the petition.

In addition to the Ninth Circuit authority cited in the Petition for Review, other jurisdictions similarly do not require *Strickland* experts but on occasion find them useful. In *Allison*, the district court denied California's motion to preclude the habeas petitioner's *Strickland* expert, but it did note that

> Respondent is correct that *Strickland* experts are disfavored:
>
> > With respect to a request for a *Strickland* expert, the prevailing view is that expert testimony regarding the standards of practice for criminal defense attorneys in capital cases does not substantially aid the district courts in resolving claims of ineffective assistance of counsel. District Courts are fully qualified to understand and apply the legal analysis required by *Strickland v. Washington* [ ], to the facts as developed during the litigation of the federal habeas corpus petition. If the Court finds that a *Strickland* expert would assist in the resolution of an ineffective assistance of counsel claim, it is not necessary for the expert to undertake a comprehensive review of the trial proceedings. Rather the expert may be consulted about the standard of care at the time of the trial proceedings, in the context of the venue in which the case was tried. In other words, it is not necessary to utilize a *Strickland* expert to tell the attorneys what the issues are. Rather, if used at all, such an expert should only be used to educate the court and the parties about the relevant standard of care for an attorney trying a death penalty case.

Allison, 2008 WL 5274580, *1 (quoting Guide to Case Management and Budgeting in Capital Habeas Cases, ¶ 27). The federal court is attuned to the fact that overuse of *Strickland* experts would drain public coffers. And while consistently holding that *Strickland* experts are not required, the Ninth Circuit has noted their usefulness:

> The district court clearly erred in relying on the testimony of Hamilton's trial counsel as to the "standard capital practice" at the time of trial and rejecting the testimony of Hamilton's *Strickland* expert. Trial counsel had never before worked on a death penalty case, had never attended a death penalty seminar, and did not recall looking into

> the ABA standards before or during his representation of Hamilton. By contrast, the *Strickland* expert's testimony as to the minimal steps that counsel was required to take in 1982 is consistent with our established case law and that of the Supreme Court. The district court's finding that defense counsel satisfied these minimal obligations is clearly erroneous.

Hamilton v. Ayers, 583 F.3d 1100, 1130 (9th Cir. 2009).

Also in the context of ruling upon a state's motion to limit expert testimony, the Wisconsin Supreme Court gave the permissible scope of a *Strickland* expert's testimony in a manner consistent with Arizona's rules for expert witness testimony. "We conclude that *Strickland* expert testimony is admissible [ ], but only to the extent the expert focuses on factual matters and does not offer his opinion on the reasonableness of trial counsel's conduct or strategy." *State v. Pico*, 914 N.W.2d 95, 112 (Wisc. 2018). "[E]xpert testimony [ ] regarding the reasonableness of trial counsel's performance is not admissible." *Id*. at 100.

Applied to Bigger's case, it is hard to envision how a *Strickland* expert would have been helpful, other than to tell the trial judge how to decide his IAC claims. On the first claim, a *Strickland* expert is unnecessary to say that "the prevailing norm is that a defense lawyer should not make a ludicrous claim as to who is the guilty party." The second and third claims are predicated on trial counsel's failure to research the law and make an informed decision based on the law, and the fifth claim concerned counsel's failure to understand the evidence that showed that her expert would not testify the way she assumed. These claims are all covered by *Strickland*'s

clear language that deference to trial counsel's decisions occurs only when trial counsel is informed as to the facts and the law. As for the fourth claim, regarding trial counsel's opening statement that insinuated Bigger would testify, any law student in Trial Advocacy class knows that a lawyer must avoid making promises in opening statement that cannot be kept, because opposing counsel will remind the jury of those unkept promises in closing argument. Unsurprisingly, the skilled and experienced prosecutor did so in this case.

C. Bruce Bigger was entitled to an evidentiary hearing.

Applying *Varner*'s "tiered structure" to the five separate manifestations of IAC raised in Bigger's PCR petition, only the first (pointing the finger at Schwartz as the killer) merits the "strong presumption" of strategy informed by investigation. The second (waiving hearsay objections), third (rescinding the character defense), fourth (making claims in opening statement suggesting and requiring Bigger's testimony), and fifth (Dr. Keen's testimony) were all errors made after incomplete investigation into the facts or law.

With regard to two of the four hearsay statements that Bigger argued should not have come before the jury, the COA blatantly misread Bigger's petition as withdrawing argument as to two of those statements. Opinion ¶ 24. Bigger plainly argued that the reason why witnesses Kim Seedor and Carroll Sanders were able to testify as to Schwartz's statements is because defense counsel opened the door by

calling them as witnesses to talk about Schwartz's statements. Rather than address Bigger's legal argument, however, the COA posited that only a strategy affected by the attorney's cocaine abuse—as was the case in *State v. Vickers*, 180 Ariz. 521 (1994)—could support a finding that trial counsel's strategy was objectively unreasonable. Opinion ¶ 25.

As to defense counsel's opening statement, the COA gives five paragraphs to explaining away parts of it, Opinion ¶¶ 26-30, while ignoring the two most critical facts stressed in Bigger's petition. First, the prosecutor stressed defense counsel's unkept promises in closing arguments. Second, the opening statement clearly implied that Bigger would testify.

As to the rescission of the character defense and calling Dr. Keen, the COA did not even try to defend those errors, instead disposing of those claims by asserting counsel's strategic choices "cannot serve as the basis for a claim of ineffective assistance of counsel." Opinion ¶ 21. The COA ignored that one decision was based on inadequate legal research and the other on inadequate factual investigation.

The decision to point the finger at Schwartz as the killer was especially unreasonable, bordering on bizarre. Schwartz built a rock-solid alibi through Lisa Goldberg, even telling her, "I couldn't have done it, you are my alibi for the entire evening." 3/14/07 RT 83. There was a suspicious man in scrubs at the medical complex who then made a call to Schwartz from Jennifer Dainty's phone, prompting

Schwartz to call back several minutes later—a fact proven by phone company records. Yet defense counsel inexplicably told the jury that "scrubs guy is a red herring." 5/9/07 RT 131-32. In closing argument the prosecutor tore the defense theory apart, coming close to ridiculing defense counsel for presenting it.

Defense counsel had the benefit not only of the State's voluminous disclosure and Schwartz's investigation but also the knowledge of the evidence presented in the Schwartz trial. Bigger stated a colorable claim that trial counsel made objectively unreasonable decisions, and he was entitled to an evidentiary hearing to prove his claim. "If in doubt, a hearing should be held to allow the defendant to raise all relevant issues, to resolve the matters finally, and to make a record for review." *State v. Carriger*, 132 Ariz. 301, 305 (1982).

Perhaps the reason for summary dismissal is appellate guidance that implies a "quota system" for granting IAC claims. This in part is due to language from federal habeas cases such as this: "cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between, and cases in which deliberate strategic decisions have been found to constitute ineffective assistance are even fewer and farther between. This is not one of those rare cases." *Provenzano*, 148 F.3d at 1332. In holding that federal habeas courts should find IAC by appellate counsel is insufficient to overcome procedural default, the Supreme Court quoted petitioner's counsel who stated the number of meritorious

claims is "minute" and "infinitesimally small." *Davila v. Davis*, 137 S. Ct. 2058, 2070 (2017). The COA then used this language from *Davila*, which related only to federal habeas review of IAC of appellate counsel claims, to apply to all IAC claims where a defendant pleads. *State v. Chavez*, 243 Ariz. 313, 318 ¶ 16 (App. 2017). By using this kind of language, courts impliedly build into the system of reviewing PCR claims with a view toward automatically denying claims, holding out for the "rare" case before granting relief. Each case must be judged on its own merits.

II. *Perry v. New Hampshire* changed Arizona law.

At the time of Bigger's trial, RAJI 45 could only be given if the defendant proved to the trial court that a potentially faulty identification was due to suggestive procedures by police. *State v. Osorio*, 187 Ariz. 579, 582 (App. 1996). This remained true while his appeal was being decided by the COA. *State v. Machado*, 224 Ariz. 343, 363-64 ¶ 63 (App. 2010), *affirmed*, 226 Ariz. 281 (2011).[6] Thus, the trial court's finding of no undue suggestiveness in the identification procedures foreclosed the jury from receiving RAJI 45. Bigger could not anticipate this change in the law. *See State v. Shrum*, 220 Ariz. 115, 118 ¶ 14 (2009) (significant changes in law are excepted from preclusion rule because "[a] defendant is not expected to anticipate significant future changes of the law in his … direct appeal."). "The archetype of

[6] The COA decided *Machado* on April 29, 2010, whereas Bigger's opening brief was filed on June 16, 2010.

such a change occurs when an appellate court overrules previously binding case law." *Id*. ¶ 16. All agree that a change in the law occurred in Arizona in 2012; all that is disputed is which 2012 case represents the "clear break from the past." *Id*. ¶ 15 (quoting *State v. Slemmer*, 170 Ariz. 174, 182 (1991)).

The Court's opinion in *Perry* opens with a three-paragraph introduction. The last sentence that introduction explains the holding:

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

565 U.S. at 232-33. Contrary to the State's view of *Perry*, Response to Petition for Review at 9, *Perry* did more than just "affirm[ ] the Court's jurisprudence on pretrial identifications." Notably, the State made no attempt to defend the COA's opinion.

Instead, the State seems to argue that because Perry did not explicitly cite *Osorio* or *Machado* and overrule them, that this means *Perry* had no impact on Arizona law. But when the Supreme Court decided *Montgomery v. Louisiana*, 577 U.S. 190 (2016), it cited no Arizona cases—and yet this Court recognized that *Montgomery* impacted Arizona law when it decided *State v. Valencia*, 241 Ariz. 206 (2016). Of course, the Supreme Court made clear that *Montgomery* applied to Arizona in *Tatum v. Arizona*, 137 S. Ct. 11 (2016). Even so, appellate courts are

expected to read U.S. Supreme Court cases arising out of other jurisdictions and glean what statements of law affect—and might even change—Arizona law. That is exactly what the COA did in *Nottingham*. This Court later recognized the correctness of *Nottingham*'s reading of *Perry*. *State v. Goudeau*, 239 Ariz. 421, 456-57 ¶¶ 138-141 (2016) (citing *Nottingham*, 231 Ariz. at 25 ¶¶ 9-10).

III. A.R.S. § 12-4234(G) violates this Court's rulemaking authority and is unconstitutional.

The COA could have avoided a lengthy discussion on jurisdiction by simply accepting the State's concession that Bigger's petition should proceed. Ironically, the only thing it left out was overruling its own prior case, *State v. Lopez*, 234 Ariz. 513 (App. 2014). Opinion ¶ 9 n.6. Despite recognizing that A.R.S. § 13-4234(G) is a procedural statute that conflicts with this Court's rules, it refused to find it unconstitutional. Instead, it "construe[d] § 13-4324(G) to mean 'jurisdictional' in … that the time limits provided by the statute limit the court's authority in harmony with the rules that do so." This is incomprehensible.

Arizona has a specific constitutional provision for separation of powers. Ariz. Const. art. 3. If it means anything, it means that when there is an irreconcilable conflict between a statute and a rule, substantive rules must give way to statutes and procedural statutes must give way to rules. The COA's attempt to harmonize violated "[a] cardinal principle of statutory interpretation [ ] to give meaning, if possible, to every word and provision so that no word or provision is rendered

superfluous." *Nicaise v. Sundaram*, 245 Ariz. 566, 568 ¶ 11 (2019). "[W]hen a conflict arises … we must draw the line. The legislature cannot repeal the Rules … made pursuant to the power provided us in article 6, § 5." *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591 (1984). Here, the simplest answer is the correct answer: this Court's precedents[7] dictate that § 13-4234(G) is unconstitutional.

The superior court is a court of general jurisdiction, and as such it always has jurisdiction to hear a PCR claim. The mechanism by which Arizona limits petitioners from bringing endless petitions is a strict rule of preclusion. Rules 32.2 & 33.2. The fact that preclusion may be waived, *see State v. Peek*, 219 Ariz. 182, 183 ¶ 4 (2008), proves that preclusion and jurisdiction are not interchangeable terms. This Court should clarify this for the benefit of the COA and overrule *Lopez*.

IV. This Court should clarify the standard of review for a trial court's summary dismissal of a PCR petition is *de novo*.

In this case the COA cited *State v. Swoopes*, 216 Ariz. 390, 393 ¶ 4 (App. 2007), for the proposition that the standard of review is "abuse of discretion." Notably, the authority upon which *Swoopes* relies for the abuse-of-discretion standard, *State v. Schrock*, 149 Ariz. 433, 441 (1986), was recently overruled in *State v. Amaral*, 239 Ariz. 217, 219-20 ¶ 10 (2016), because of a different misstatement

[7] *State v. Birmingham*, 96 Ariz. 109 (1964); *State v. Fowler*, 156 Ariz. 408 (App. 1987); *State v. Bejarano*, 158 Ariz. 253 (1988); *State ex rel. Napolitano v. Brown*, 194 Ariz. 340 (1999); *State v. Reed*, 248 Ariz. 72 (2020).

of the standard of review. Other cases state that the reason for abuse of discretion review is because "A decision as to whether a petition for post-conviction relief presents a colorable claim is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73 (1988) (citing *State v. Adamson*, 136 Ariz. 250, 265 (1983)). This Court did not explain what part of reviewing a petition is discretionary, even when repeating the standard more recently in *Pandeli*, 242 Ariz. at 180 ¶ 4. This standard violates *Strickland*, which states that "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." 466 U.S. at 698. With mixed questions of fact and law, this Court "give[s] deference to the trial court's factual findings…but [ ] review de novo the trial court's ultimate legal determination." *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118 (1996) (citing *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

Abuse of discretion is an appropriate standard where the trial court granted an evidentiary hearing and thus had discretion to weigh the evidence and determine the facts. Where the trial court summarily dismisses a notice or a petition for failing to make a colorable claim, however, the trial court is required to assume the truth of every fact alleged by the petitioner. Ariz. R. Crim. P. 32.11(a). Thus, a trial court performs no discretionary act when reviewing a notice or petition.

In civil cases, the standard of review for a grant or denial of motions to dismiss or motions for summary judgment is *de novo*, because the evidence is viewed most

favorably to the non-moving party. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-56 ¶ 7 (2012); *Brush & Nib v. City of Phoenix*, 247 Ariz. 269, 278 ¶ 28 (2019). This should be the standard applied to PCR petitions. The fact that Criminal Rule 32.11(a) uses similar language to Rule 56(a), Ariz. R. Civ. P., i.e., that there is no "material issue of fact," shows that the summary judgment standard should apply to PCR petitions.

When the trial judge is also the PCR judge, the judge's recollection of the trial and evaluation of prejudice might be more fact-intensive, and thus it is appropriate to afford deference to the factual findings. But where as here the PCR judge was not the trial judge, the PCR judge has no better vantage point for reviewing the cold record than does the appellate court. *See State v. Sweeney*, 224 Ariz. 107, 111 ¶ 12 (App. 2010) ("Because the trial court is in no better position to evaluate the video than the appellate court, we have conducted an independent review of the video evidence."). Judge Warner presided over Bigger's trial but retired before Bigger's PCR was litigated. To the extent Judge Hinderaker made factual findings in his PCR ruling, he had no more exposure to the evidence than did the appellate courts.

This error infected the COA's decision in this case, because the COA stated no less than four times that the trial court did not abuse its discretion. Opinion ¶¶ 23, 25, 28, 30. This Court should clarify the standard of review of dismissed PCR notices and petitions is *de novo*.

CONCLUSION

Bruce Bigger is entitled to an evidentiary hearing on his claims of IAC and significant change in the law.

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