IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

RONALD BRUCE BIGGER,
Petitioner.

No. 2 CA-CR 2019-0012-PR
Filed October 14, 2020

Petition for Review from the Superior Court in Pima County
No. CR20043995001
The Honorable Nanette M. Warner, Judge
The Honorable John C. Hinderaker, Judge
The Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine L. Roll, Deputy County Attorney, Florence
Counsel for Respondent

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Petitioner

OPINION

Chief Judge Vásquez authored the opinion of the Court, in which Presiding Judge Staring and Judge Eppich concurred.

V Á S Q U E Z, Chief Judge:

¶1 Petitioner Ronald Bigger seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Bigger has not sustained his burden of establishing such abuse here.

Factual and Procedural Background

¶2 After a jury trial, Bigger was convicted of first-degree murder and conspiracy to commit first-degree murder. On July 16, 2007, the trial court sentenced him to concurrent prison terms of natural life. This court affirmed his convictions and sentences on appeal and issued its mandate on March 30, 2012. *State v. Bigger*, 227 Ariz. 196 (App. 2011).

¶3 On May 2, 2012, Bigger filed a motion for an extension of time for filing his notice of post-conviction relief, which the trial court granted. Bigger filed his notice on May 21, 2012, but did not file his petition until January 2016, following multiple extensions. Bigger argued he had received ineffective assistance of trial counsel based on counsel's "putting forth a theory of the case that was unfounded and completely contradicted by the evidence," "stipulating . . . to make no hearsay objections" to certain evidence, "rescinding a character defense," "making claims during opening statements that could only have been testified to by [Bigger], knowing [he] would not be testifying," and calling an expert witness as to the possible time of the victim's death. Bigger also argued *Perry v. New Hampshire*, 565 U.S. 228 (2012), was a significant change in the law that entitled him to relief. In a pro se petition,[1] Bigger asserted claims of judicial bias, due process claims relating to identification, disclosure violations by the state, additional claims of ineffective assistance of trial counsel, actual innocence, and denial of his right to counsel based on conflicts with counsel. The trial court summarily denied relief.

[1]The trial court granted Bigger's motion for hybrid representation and allowed him to file a pro se petition.

Discussion

Timeliness of Petition for Post-Conviction Relief

¶4 In his petition for review, Bigger argued the trial court had abused its discretion in denying relief on his claims of ineffective assistance of counsel and in rejecting his claim of a significant change in the law. This court, however, ordered supplemental briefing pointing out that although the trial court had granted an extension of time for Bigger to file his notice of post-conviction relief, it lacked jurisdiction to do so. *See State v. Lopez*, 234 Ariz. 513 (App. 2014). Noting that recently passed amendments to the Arizona Rules of Criminal Procedure could arguably apply, we asked the parties to address the applicability of the new rules and whether A.R.S. § 13-4234 nonetheless required dismissal of Bigger's notice or the claims raised therein.

¶5 In its supplemental brief, the state concedes that the new rules apply. We agree. As the state points out, our supreme court's order provides that the amended and additional rules apply to actions pending on January 1, 2020, "except to the extent that the court in an affected action determines that applying the rule or amendment would be infeasible or work an injustice, in which event the former rule or procedure applies." Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). And both divisions of this court have applied the new rules to cases pending review in the appellate court. *See State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) (Division Two); *State v. Botello-Rangel*, 248 Ariz. 429, n.1 (App. 2020) (Division One).

¶6 Under former Rule 32.1(f), a defendant filing a "notice of post-conviction relief of-right"[2] could seek relief if the failure to timely file that notice was "not the defendant's fault." Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017). Pursuant to Rule 32.4(a)(2)(D), a notice in any other noncapital case, however, had to be filed within ninety days after sentencing or thirty days after the mandate on appeal. Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017). As provided in Rule 32.4(a)(2)(A), these time limits did not apply to claims made pursuant to Rule 32.1(d) through (h), but constitutional claims raised under Rule 32.1(a), such as claims of

[2]An "Of-Right Petition" was defined as one filed by a "defendant who pled guilty or no contest, or who admitted a probation violation, or who had an automatic probation violation based on a plea of guilty or no contest." Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017). Rule 32.1(f) only allowed nonpleading defendants to seek leave to file a delayed notice of appeal. Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017).

ineffective assistance of trial counsel, were subject to these deadlines. Ariz. Sup. Ct. Order R-17-0002 (Aug. 31, 2017).

¶7 When our supreme court amended Rule 32.4, it provided that although a notice of post-conviction relief raising claims under Rule 32.1(a) must still be filed within ninety days after sentencing or thirty days after entry of the appellate court's mandate, trial courts "must excuse an untimely notice . . . if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." Ariz. R. Crim. P. 32.4(b)(3)(A), (D).[3] In this case, Bigger's motion for an extension of time to file his notice, which was filed after the time for the notice had passed, explained that appellate counsel needed additional time "to secure counsel to represent [Bigger] in his post-conviction proceedings." Thus, because Bigger was represented and clearly relying on counsel at that point, counsel and not Bigger was at fault for the late filing of the motion for an extension. And, as noted above, the trial court granted the motion, resulting in a delay of the filing of the notice. Under these circumstances we cannot say Bigger was at fault in regard to the untimely filing of the notice—indeed in view of counsel's actions and the court's having granted the motion, he could only have assumed he had been granted the additional time. Thus, under current Rule 32.4, the court was required to excuse the untimely notice.

¶8 As we pointed out in our order for supplemental briefing, however, § 13-4234 arguably conflicts with this provision of Rule 32. Section 13-4234(C) provides the same thirty- and ninety-day limits set forth in Rule 32, but the statute does not include a provision excusing the untimely filing of a notice of post-conviction relief when the defendant is not at fault.[4] Rather, it provides that "[t]he time limits are jurisdictional, and an untimely filed notice or petition shall be dismissed with prejudice." § 13-4234(G). And although A.R.S. § 13-4232(B), like former Rule 32, allows claims pursuant to A.R.S. § 13-4231(4) through (7) "to be raised in a successive or untimely petition," no such provision is made for claims

[3]Under the current rule, claims that fall under Rule 32.1(d) through (h) remain exempt from the time limits, as are claims of lack of subject matter jurisdiction and unlawful sentence, which fall under Rule 32.1(b) and (c). Ariz. R. Crim. P. 32.4(b)(3).

[4] Section 13-4231(6), A.R.S., however, allows relief when a "defendant's failure to appeal from the judgment or sentence, or both, within the prescribed time was without fault on his part."

pursuant to subsections (1) through (3), including constitutional claims such as the claims of ineffective assistance of counsel raised here.[5]

¶9 Bigger argues the statute "is unconstitutional to the extent that it contradicts the Arizona Rules of Criminal Procedure."[6] The state contends that this provision has never been declared unconstitutional, and contends the statute does not conflict with Rules 32 and 33, but "[r]ather, the rules provide an escape route to diminish the harsh penalty for untimely filed notices."

¶10 Under Arizona law, "the legislature 'has all power not expressly prohibited or granted to another branch of the government.'" *State ex rel. Napolitano v. Brown*, 194 Ariz. 340, ¶ 5 (1999) (quoting *Adams v. Bolin*, 74 Ariz. 269, 283 (1952)). Article VI, § 5 of the Arizona Constitution allocates to our supreme court the "[p]ower to make rules relative to all procedural matters in any court." The constitution further separates the three departments of government and precludes any department from "exercis[ing] the powers properly belonging to either of the others." Ariz. Const. art. III. Therefore, the legislature may not enact a statute that conflicts with the rulemaking authority of our supreme court. *State v. Reed*, 248 Ariz. 72, ¶ 9 (2020) (quoting *Brown*, 194 Ariz. 340, ¶ 6). But, the courts will "recognize 'reasonable and workable' procedural laws" passed by the legislature "if they supplement rather than conflict with court procedures." *Id.* ¶ 10 (quoting *Seisinger v. Siebel*, 220 Ariz. 85, ¶ 8 (2009)).

¶11 Furthermore, "[r]ules and statutes 'should be harmonized wherever possible and read in conjunction with each other.'" *State v. Hansen*, 215 Ariz. 287, ¶ 7 (2007) (quoting *Phoenix of Hartford, Inc. v. Harmony Rests., Inc.*, 114 Ariz. 257, 258 (App. 1977)). When they cannot be harmonized, "we must then determine whether the challenged statutory provision is substantive or procedural." *Seisinger*, 220 Ariz. 85, ¶ 24. Substantive provisions are to be made by the legislature, while the courts control procedural matters. *Id.* ¶¶ 26-28. "[T]he substantive law is that part of the law which creates, defines and regulates rights; whereas the

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[5]Unlike his claims of ineffective assistance of counsel, Bigger's claim of a significant change in the law entitling him to relief is exempt from the timeliness requirements as it falls under § 13-4231(7).

[6] Bigger also argues "[t]he deadline for filing a notice of post-conviction relief is not jurisdictional" and our decision to that effect in *Lopez* was incorrect. In view of our resolution of the issues presented here, we decline this request to revisit our decision in *Lopez*.

adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion." *Id.* ¶ 29 (quoting *State v. Birmingham*, 96 Ariz. 109, 110 (1964)).

¶12 In 1987, in *State v. Fowler*, 156 Ariz. 408 (App. 1987), this court addressed portions of §§ 13-4232 and 13-4234, which set a time limit on the filing of a notice in post-conviction proceedings, providing that a petitioner could not obtain relief based on a ground raised more than a year after the mandate on appeal. At that time Rule 32.4 did not include any time in which notices were to be filed or claims were to be raised. *Id.* at 410. Concluding that because the "time limit set forth in the statutes does not take away the vested right to post-conviction relief," but merely "implements the existing right," the court found the matter procedural and therefore subject to court rule, not legislative enactment. *Id.* at 411-13. In a separate matter, this court denied a petition for review citing the statute. *See State v. Bejarano*, 158 Ariz. 253, 254 (1988) (noting appellate court's denial of review). On review, our supreme court expressly adopted the *Fowler* court's reasoning. *Id.*

¶13 In 1996, apparently "to fulfill the opt-in provisions of federal habeas laws," *Brown*, 194 Ariz. 340, ¶ 3, the legislature amended § 13-4234 in various ways, including the addition of new time limits and the "jurisdictional" provision in subsection (G), *see* 1996 Ariz. Legis. Serv. 7th Spec. Sess., ch. 7. Thereafter, our supreme court accepted special-action jurisdiction in *Brown*, addressing the "time limits for filing petitions for post-conviction relief that conflict with time limits set in rules adopted by th[e] court." 194 Ariz. 340, ¶ 1. Citing *Bejarano* and *Fowler*, and rejecting a claim based on the Victims' Bill of Rights, the court determined that "the statutory time limits conflicting with those in Rule 32.4[] are unconstitutional." *Id.* ¶¶ 6, 11, 14. It is thus clear that our supreme 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. This was so even after the addition in 1996 of the term "jurisdictional" in § 13-4234(G). *See Brown*, 194 Ariz. 340.

¶14 Because the statutes and rules provide for the same time in which to file a notice, however, the circumstances of this case do not present a conflict as to the number of days provided for the filing of a notice for post-conviction relief. Instead, the question is whether §§ 13-4232 and 13-4234, which do not include an exemption from the statutory time limits for constitutional claims, conflict with the new provisions of Rules 32 and 33, which provide that a defendant may be excused from filing a timely

notice when he or she is not at fault for the late filing of a notice raising such claims.

¶15 As stated above, § 13-4234(G) provides that the statutory "time limits are jurisdictional," which could be read to create a substantive requirement. But our courts have found provisions procedural in nature despite the legislature's insertion of the term "jurisdictional." *See Pompa v. Superior Court*, 187 Ariz. 531, 533-35 (App. 1997); *see also In re 6757 S. Burcham Ave.*, 204 Ariz. 401, ¶ 6 (App. 2003) (adopting *Pompa*). Nor does a provision become substantive "merely because the sanctions available for violation of the rule affect the viability of a claim." *State v. Jackson*, 184 Ariz. 296, 300 (App. 1995); *cf. Pritchard v. State*, 163 Ariz. 427, 429-33 (1990) ("compliance with [notice of claim statute] is not jurisdictional" even though "[t]he requirement of filing a claim with the state is mandatory and an essential requisite to plaintiff's cause of action"). Thus, we cannot say the use of the word "jurisdictional" in subsection (G) transforms the time limits in the statute into substantive provisions.

¶16 As our courts have often acknowledged, the use of the word "jurisdiction" in the law has been complicated, and, indeed, historically the term has been misused. *See, e.g.*, *State v. Bryant*, 219 Ariz. 514, ¶ 14 (App. 2008) ("Our supreme court has recognized that the word 'jurisdiction,' like the word 'void,' has frequently been misused by our courts."). "Subject matter jurisdiction is 'the power of a court to hear and determine a controversy.'" *Id.* (quoting *Marks v. LaBerge*, 146 Ariz. 12, 15 (App. 1985)). But "there have been instances where appellate tribunals have used the word 'jurisdiction' when, in reality, they meant, not the power to perform a certain act, but the performing of it when it was prohibited, a very different thing." *Collins v. Superior Court*, 48 Ariz. 381, 393 (1936) (emphasis omitted).

¶17 "Jurisdiction to entertain a criminal appeal is vested in this court by the timely filing of a notice of appeal pursuant to a jurisdictional statute." *State v. Serrano*, 234 Ariz. 491, ¶ 5 (App. 2014) (quoting *State v. Smith*, 171 Ariz. 501, 503 (App. 1992)). Likewise, to consider a notice of post-conviction relief, a court must have subject matter jurisdiction—which the legislature provided in creating the right to post-conviction relief. *See Fowler*, 156 Ariz. at 411-12. Additionally, to confer jurisdiction on the court the defendant must file a timely notice of post-conviction relief, pursuant to the Rules of Criminal Procedure. *See State v. Superior Court*, 102 Ariz. 388, 392 (1967) ("The lower courts of this state are bound by law to follow the rules promulgated by the Supreme Court . . . ."); *cf. State v. Hill*, 85 Ariz. 49, 52-54 (1958) (holding rules at issue "must be strictly complied with" and

trial court has no authority to extend time for motion for new trial). Thus, although the court may have the power to rule on a notice of post-conviction relief (subject matter jurisdiction), it may nonetheless lack the authority to do so "when it [i]s prohibited," *Collins*, 48 Ariz. at 393, such as when the procedural rules bar the claim.

¶18 In view of this law, and following the requirement that we "attempt to harmonize" the statute and the rule if possible, *Lear v. Fields*, 226 Ariz. 226, ¶ 8 (App. 2011), we construe § 13-4324(G) to mean "jurisdictional" in this later sense of the word—that the time limits provided by the statute limit the court's authority in harmony with the rules that do so. Thus, 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.

¶19 In this case, as detailed above, Bigger's claims of ineffective assistance of counsel, which fall under Rule 32.1(a), are not time barred because the untimeliness of the notice was not his fault. His claims raised under Rule 32.1(g) are exempt from the time limits. *See* Ariz. R. Crim. P. 32.1(f), 32.2(b), 32.4(b)(3). We therefore address them in turn.

Ineffective Assistance of Counsel

¶20 Bigger first contends the trial court abused its discretion in dismissing his claims of ineffective assistance of trial counsel. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21 (2006); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show prejudice, a defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶21 Several of Bigger's claims of ineffective assistance of counsel focus on strategic choices by trial counsel, including counsel arguing Bigger's co-defendant Bradley Schwartz had killed the victim himself, "giving up" a character defense, and in calling a certain expert witness. "Matters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250 (1988). Trial counsel is

presumed to have acted properly unless a petitioner can show that counsel's decisions were not tactical "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586 (1984); *see also State v. Pandeli*, 242 Ariz. 175, ¶ 21 (2017) ("no [ineffective assistance] if counsel's decision had a reasoned basis rather than the result of 'ineptitude, inexperience, or lack of preparation'" (quoting *Goswick*, 142 Ariz. at 586)).

¶22 The trial court concluded Bigger had not shown counsel's decisions were other than tactical or that her performance had fallen below prevailing professional norms. It noted Bigger had not offered "an affidavit from an expert witness" to support his claims or otherwise shown that counsel's decisions, even if ultimately unsuccessful, were the result of a lack of experience or preparation. We agree.

¶23 Bigger argues that "[n]o law requires a Rule 32 petitioner to include a standard-of-care declaration." But, as stated above, to establish a colorable claim of ineffective assistance a defendant must show that counsel's performance "fell below objectively reasonable standards." *Bennett*, 213 Ariz. 562, ¶ 21. And Rule 32.7(e) requires a defendant to "attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition." In *State v. Nash*, 143 Ariz. 392, 397 (1985), adopting the *Strickland* objective standard for deficient performance, our supreme court explained that courts could "consult various sources to decide whether counsel's actions were reasonable considering the circumstances." The court suggested American Bar Association standards and the possibility of expert testimony at an evidentiary hearing. *Id.* Arizona courts have also concluded that a defendant may carry the burden to establish a colorable claim when it may be established as a legal matter that counsel "was 'unreasonably mistaken' about the law." *State v. Speers*, 238 Ariz. 423, ¶ 18 (App. 2015) (quoting *State v. Lee*, 142 Ariz. 210, 218-19 (1984)); *see also Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."). Thus, 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. *See State v. Gerlaugh*, 144 Ariz. 449, 455 (1985); *see also Goswick*, 142 Ariz. at 586. On the record before us, we cannot agree with Bigger's assertion that he presented a colorable claim that counsel's decisions lacked

a reasoned basis. The trial court therefore did not abuse its discretion in denying relief on these claims without an evidentiary hearing.

¶24 Bigger further contends counsel was ineffective based on alleged mistakes before and during trial, including agreeing not to make hearsay objections to Schwartz's statements and making opening statements that were not later supported by evidence at trial. Before trial, the parties agreed that co-defendant Schwartz's statements would be admissible against hearsay objections. Bigger argues many of Schwartz's statements that were helpful to Bigger would already have been admissible and the agreement resulted in the admission of harmful statements that otherwise would not have been admissible. In his petition for post-conviction relief, Bigger pointed specifically to four statements by Schwartz: (1) asking Bigger "how the scrubs worked out," (2) asking another witness if she had seen "the knife on the front of [Bigger's] bike," (3) telling someone he "would provide free medical services to 'people so they would owe him,'" and (4) telling someone that "he wanted to 'get his friend [Bigger] off which in turn would get him off.'" But in his reply Bigger essentially conceded that some of these statements, particularly the last two, might have been admissible even without the agreement and shifted his argument to assert primarily that counsel should not have called the witnesses because the strategy they were meant to support "was patently unreasonable."

¶25 On review, however, Bigger again asserts that absent the agreement, the statements "would . . . be inadmissible hearsay and violate the Confrontation Clause." Citing *State v. Vickers*, 180 Ariz. 521, 525-27 (1994), he argues an attorney provides ineffective assistance by "allow[ing] inadmissible testimony to become admissible by conscious strategic decision" and "that evidence is helpful to the State's case." But, unlike the situation in *Vickers*, in which counsel's "preparation for trial was haphazard at best" and the court was "unable to conceive of any logical basis" for counsel's decision, *id.* at 526, we cannot say the statements here could not have been helpful to Bigger, as the trial court stated in its ruling. Nor does the record support the claim that counsel failed to prepare for trial. And, to the extent Bigger challenges counsel's strategic decision to call the witnesses, he has not established counsel "fell below objectively reasonable standards." *See Bennett*, 213 Ariz. 562, ¶ 21. The trial court therefore did not abuse its discretion in summarily denying relief on this point.

¶26 Bigger further maintains that counsel was ineffective in regard to her opening statement. He asserts counsel made claims that "could only have been testified to by [Bigger], knowing that [he] would not

be testifying" and that were "not supported by the evidence during trial." Specifically, he cited statements about Bigger and Schwartz's relationship and about the details of an asserted alibi. The prosecutor mentioned in closing argument that the evidence did not support the statements.

¶27 During her opening, Bigger's counsel stated, "What you will hear is testimony from a waitress at Denny's" that she saw him "one time on" the day of the murder when "he was a customer," "he chatted with her, he ate some of her french fries, [and] he asked to borrow a phone book so he could call a cab." The waitress testified that Bigger had sat down at the counter and stayed "between half an hour and an hour." When asked if she or Biggers had eaten anything she said, "I don't remember." She further testified she had given him a card for a cab company, because the phone book pages were missing, and he had used the pay phone. On cross-examination she agreed that in previous testimony she had said Bigger "could have come in the store on a couple of occasions" and that she was not certain of the date he had been there.

¶28 Thus, although in closing the prosecutor argued the waitress's testimony had been inconsistent with counsel's assertions both as to the length of time and the french fries, it was actually only the detail of Bigger's having eaten the witness's fries that was missing from her testimony. The trial court concluded Bigger had not established prejudice as a result of the discrepancies between counsel's opening statement and the evidence presented. We cannot say the court abused its discretion in so concluding on this point.

¶29 As to Bigger's relationship with Schwartz, his counsel explained that the two had met after Bigger had a facial injury. She stated that he had been referred to Schwartz and during his treatment

> they started talking, they were talking about investments, [Bigger] use[d] to be affiliated with the Chicago Board of Trade, they hit it off. They saw each other and went to dinner occasionally. And I think that you will also conclude that Dr. Schwartz used [Bigger], not for the theory that the State says, but because [Bigger] knew some women, and . . . Dr. Schwartz has an addiction to women.

¶30 As the state pointed out in its response to Bigger's petition for post-conviction relief, Bigger's mother told law enforcement officers that he

had worked for the Chicago Board of Trade. But she did not testify to that effect at trial. During her testimony, however, a recording of a call to her from Bigger in the jail was played. During that call, Bigger stated he had gone to dinner with Schwartz on several occasions and had double-dated with him, supporting the main point of counsel's statement. Thus, in this instance again, only one detail in the opening statement was unsupported at trial—that Bigger had been affiliated with the Chicago Board of Trade. We cannot say the trial court abused its discretion in determining Bigger had not established prejudice as a result of the statement.

Significant Change in the Law Regarding Pre-Trial Identification

¶31 Bigger also argues the trial court abused its discretion because its "analysis concerning significant change in the law [was] contrary to law." Bigger argues, as he did in his petition for post-conviction relief, that *Perry* was a significant change in the law that entitled him to relief. "Rule 32 does not define 'a significant change in the law.'" "But plainly a 'change in the law' requires some transformative event, a 'clear break from the past.'" *State v. Werderman*, 237 Ariz. 342, ¶ 5 (App. 2015) (quoting *State v. Shrum*, 220 Ariz. 115, ¶ 15 (2009)).

¶32 In *Perry*, the United States Supreme Court declined to "enlarge the domain of due process" in relation to pretrial identification procedures to include situations "without the taint of improper state conduct." 565 U.S. at 245. In so doing, the Court noted that "[e]yewitness-specific jury instructions," along with other safeguards available protected against juries "placing undue weight on eyewitness testimony of questionable reliability." *Id.* at 245-46. In *State v. Nottingham*, 231 Ariz. 21, ¶ 13 (App. 2012), applying the reasoning of *Perry,* this court changed the existing law in Arizona "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 pretrial identification procedure was 'unduly suggestive.'"

¶33 Here, the trial court determined that *Perry* was not a significant change in the law and that Bigger was actually seeking relief in reliance on *Nottingham*. Concluding that Bigger's case had become final before *Nottingham* was decided and that it did not apply retroactively, it denied relief. On review Bigger contends the court was incorrect.

¶34 We agree with the trial court's analysis of this claim. In *Perry*, the Supreme Court stated expressly that it had found "no convincing reason to alter [its] precedent." 565 U.S. at 248. On that basis, it concluded that "a

preliminary judicial inquiry into the reliability of an eyewitness identification" was not required to satisfy due process "when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement." *Id.* Thus, we cannot say that *Perry* itself constituted a significant change in the law.

¶35 In *Nottingham*, however, this court reasoned that the Supreme Court had "clearly assumed that trial courts would provide cautionary instructions, . . . even when the suggestive pretrial identification was not due to 'improper state conduct.'" 231 Ariz. 21, ¶ 12 (quoting *Perry*, 565 U.S. at 245). Thus, we concluded that "to bring Arizona instruction practice into conformity with *Perry*," it was necessary to alter existing Arizona law and require a specific instruction, even in the absence of improper state conduct.[7] *Id.* ¶ 15.

¶36 For Bigger to be entitled to relief, however, the new rule set forth in *Nottingham* must be retroactively applicable, because Bigger's

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[7]In *Nottingham*, we also stated, "*Perry* has modified Arizona law to the extent" an instruction had been conditioned on a formal finding that the identification procedure was unduly suggestive. 231 Ariz. 21, ¶ 13. At oral argument before this court, Bigger maintained that statement reflected our holding that *Perry* was a significant change in the law. Analogizing to our supreme court's recognition of *Miller v. Alabama*, 567 U.S. 460 (2012), as a significant change in the law in *State v. Valencia*, 241 Ariz. 206 (2016), he argued that *Nottingham* merely recognized the change *Perry* represented and was not itself a change. But in *Valencia*, the court stated that *Miller* represented a "clear break from the past," directly changing Arizona law on the availability of life sentences for juveniles. 241 Ariz. 206, ¶¶ 9, 15 (quoting *Shrum*, 220 Ariz. 115, ¶ 15). In contrast, in *Nottingham*, we recognized that the "core rationale" of *Perry* did not apply. 231 Ariz. 21, ¶ 10. Rather, we noted that the *Perry* Court had "trusted the 'safeguards built into our adversary system,'" including jury instructions, to test the reliability of identification evidence. *Id.* ¶ 11 (quoting *Perry*, 565 U.S. at 245). Therefore, by *implication*, a change to Arizona law was required. *Id.* ¶ 12 ("the Court's reasoning implies that a trial court would err in declining to provide an instruction"). In view of our reasoning and the *Perry* Court's clear statement that it was relying on precedent, 565 U.S. at 248, our use of the phrase, "*Perry* has modified Arizona law" meant only that we were making a change to Arizona law in consideration of *Perry*'s reasoning, 231 Ariz. 21, ¶ 13, not that *Perry* itself represented a change in the law as was the case in *Valencia*.

conviction became final on March 30, 2012, when our mandate issued on his appeal. *See State v. Towery*, 204 Ariz. 386, ¶ 8 (2003). A rule applies retroactively when a conviction is final, when a new rule is substantive rather than procedural, and when a procedural rule "fits within one of two narrow exceptions that permit retroactive application of a new rule of criminal procedure." *Id.* ¶ 7 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

¶37 "A new rule 'breaks new ground or imposes a new obligation on the States or the Federal Government.'" *Id.* ¶ 9 (quoting *Teague*, 489 U.S. at 301). Our decision in *Nottingham* imposed a new requirement for the eyewitness-specific instruction in the absence of improper state conduct. 231 Ariz. 21, ¶ 13. It was, therefore, a new rule. But the rule was clearly procedural. A substantive rule "determine[s] the meaning of a criminal statute" and "often address[es] the criminal significance of certain facts or the underlying prohibited conduct." *Towery*, 204 Ariz. 386, ¶ 10. Procedural rules, in contrast, deal with matters of criminal procedure. *See id.* ¶¶ 12-13 (concluding requirement that jury rather than judge find aggravating factors procedural); *see also State v. Lee*, 189 Ariz. 590, 602 (1997) (change to "reasonable efforts" jury instruction as to lesser-included offenses "procedural in nature").

¶38 A procedural rule will only apply retroactively when it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or announces "a watershed rule of criminal procedure that is 'implicit in the concept of ordered liberty.'" *Towery*, 204 Ariz. 386, ¶ 14 (quoting *Teague*, 489 U.S. at 307, 311). We cannot say the addition of the eyewitness-specific instruction was such that "[i]nfringement of the rule . . . seriously diminish[es] the likelihood of obtaining an accurate conviction." *See id.* ¶ 17 (first alteration in *Towery*, second alteration added) (quoting *Tyler v. Cain*, 533 U.S. 656, 665 (2001)). Nor can we say it is a "procedure[] without which the likelihood of an accurate conviction is seriously diminished." *See id.* ¶ 18 (alteration in *Towery*) (quoting *Teague*, 489 U.S. at 313). Thus, we agree with the trial court's conclusion that the rule set forth in *Nottingham* is not retroactively applicable and cannot serve as a basis for relief here. The court therefore did not abuse its discretion in summarily denying relief.

Disposition

¶39 For all these reasons, although we grant the petition for review, we deny relief.