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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:) Supreme Court No. R-24-0006
)
PETITION TO AMEND ARIZONA) COMMENT
CODE OF JUDICIAL CONDUCT)
RULE 2.6 (ENSURING THE RIGHT)
TO BE HEARD))
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Pursuant to Arizona Rule of the Supreme Court 28, the Arizona Attorney General’s Office (“AGO”) respectfully submits the following comment regarding Petition R-24-0006 (“Petition”). The AGO is concerned that the proposal could lead to unequal treatment of litigants. Further, the proposal could have unintended consequences in federal habeas corpus proceedings.

The Petition proposes to amend Rule 2.6 to add the following comment:

The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to: liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

For starters, this permissive suggestion could result in the unequal treatment of criminal post-conviction petitioners. For instance, one judicial officer may liberally construe a self-represented litigant's notice of post-conviction relief and allow the petition to move forward where another may summarily dismiss the petition as deficient. Or the same judicial officer applying the concept of liberal construction might hold a represented post-conviction litigation to a more stringent standard. In any circumstance, the potential for dissimilar treatment thwarts the proposed comment's stated goal of equal access to justice.

Furthermore, liberal construction of pro se pleadings during post-conviction proceedings could undermine the adequacy of our state procedural rules. Under Arizona law, "[p]etitioners must strictly comply with Rule 32 or be denied relief," and "[f]ailure to comply with Rule 32 procedure will result in a finding that [a] petitioner waived his right to present a Rule 32 petition." *State v. Carriger*, 143

Ariz. 142, 146 (1984). Strict construction and application of our state procedural rules is crucial to ensure that our state courts have the initial opportunity to consider and rule on a post-conviction petitioner's federal claims.

The federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgement." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Adequacy depends on the application of "firmly established and regularly followed" state procedural rules. *See Lee v. Kemna*, 534 U.S. 362, 376 (2002). And "state procedural requirements which are not strictly or regularly followed" cannot prevent federal review of a federal claim not first considered by the state courts. *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). A policy of liberal construction towards pro se pleadings in post-conviction proceedings could undermine the strict application of Rule 32's preclusion rules because counseled post-conviction petitioners would not be entitled to the same policy. The federal courts recognize that our state procedural rules are adequate to preclude federal review because they are independent of federal law and consistently applied. *See e.g., Jones v. Ryan*, 691 F.3d 1093, 1101 (9th Cir. 2012) (holding that Arizona Rule of Criminal Procedure 32.2(a)(3) is independent of federal law and consistently applied). But the inconsistent application of our state procedural rules could undermine their

adequacy and enable federal review. *See Cruz v. Arizona*, 598 U.S. 17, 32 (2023).

Additionally, the inconsistent application of our state procedural rules could upset concepts of exhaustion in habeas corpus cases and invite frequent and unnecessary returns to state court for additional collateral proceedings. In federal habeas cases filed under 28 U.S.C. § 2254, state prisoners are expected to exhaust available state remedies as to any federal claims. *Coleman*, 501 U.S. at 731. Where a state prisoner has failed to present, or has defaulted, his federal claims in state court, he is considered to have technically exhausted his federal claims because there is no longer a state remedy available to him. *Id.* at 732. But if our state procedural rules are not firmly established and regularly followed, the federal courts could find that a claim is no longer technically exhausted. Where a federal claim is unexhausted, federal courts can stay the federal proceedings so that the prisoner can return to state court to exhaust the federal claim. *See e.g., Rhines v. Weber*, 544 U.S. 269, 273–77 (2005). A potential relaxation of our state procedural rules through the liberal construction of pleadings could therefore create an influx of meritless post-conviction petitions.

While the policy underlying liberal construction is laudable, the potential for disparate treatment between self-represented post-conviction petitioners and represented ones undermines the strict nature of Arizona’s criminal post-conviction scheme. On one hand, all post-conviction petitioners are entitled to the same

expectation of due process regardless of whether they are represented. And on the other, Arizona’s post-conviction mechanism is carefully constructed to ensure that our state courts have the first opportunity to consider and rule on federal claims. The Arizona Attorney General’s Office therefore requests that criminal post-conviction proceedings either be excepted from the policy of liberal construction or that the comment be modified for clarity. To that effect, the last sentence to the proposed comment could read:

Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants, and the self-represented status of a litigant should in no way determine the outcome of the proceeding.

CONCLUSION

The Attorney General’s Office respectfully requests that this Court take the above stated concerns into account when deciding whether to adopt Petition R-24-0006.

RESPECTFULLY SUBMITTED this 1st day of May, 2024

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By _____
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