

The Honorable Joseph Malka
Clerk of the Superior Court in and for Maricopa County
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IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of:

	)	Supreme Court No. R-25-0044
PETITION TO AMEND CRIMINAL	)	
RULES 28.1 AND 28.2 AND VARIOUS	)	
OTHER RULE SETS RELATING TO	)	COMMENT OF THE CLERK OF THE
RECORDS RETENTION AND	)	SUPERIOR COURT IN AND FOR
DISPOSITION	)	MARICOPA COUNTY
_____	)	

The Clerk of the Superior Court in and for Maricopa County (“Maricopa County Clerk” or “the Clerk”) files the following Comment pursuant to Rule 28(c), Arizona Rules of the Supreme Court, in support of the Petition to Amend Criminal Rules 28.1 and 28.2 and Various Other Rule Sets Relating to Records Retention and Disposition, with recommendations for the inclusion of additional, clarifying information with regard to the proposed amendments to Rule 28.1 of the Arizona Rules of Criminal Procedure.

The Maricopa County Clerk strongly supports the work performed by the Arizona Advisory Committee on Evidence Retention and its goal “to provide clear direction to court personnel responsible for practically applying the records retention and disposition scheduled when managing the storage of disposition of evidence, including electronically stored evidence.” And the Clerk is also very much appreciative of the Arizona Supreme Court and former Chief Justice Robert Brutinel ensuring clerks of court representation on the Advisory Committee, with membership including, clerks of court from Pinal, Santa Cruz, and Yavapai Counties, as well as a deputy director representative of the Office of the Clerk of the Superior Court in and for

Maricopa County. And by and large the Maricopa County Clerk maintains that the proposed rule changes which were adopted on an emergency basis on August 26, 2025, will be of a significant benefit to clerks of court in ensuring proper retention and disposition of exhibits, both those admitted in evidence and those offered for admission in evidence, but not received in evidence, as well as illustrative aids,

However, the Maricopa County Clerk believes that there needs to be greater clarity and specificity provided as relates to Criminal Rule 28.1, and specifically regarding what it means for a defendant to exhaust all state court remedies as well as what it means for a defendant to exhaust all federal remedies. Clerks of court staff who work in records retention, are, for the most part, not lawyers, and most are not law trained. And the concepts of exhaustions of state and federal court remedies in a criminal case are complex, and even those who are law trained, but do not practice in the area of criminal law and post-conviction proceedings, find this area of the law to be extremely nuanced and complicated. As a result, the Clerk maintains that more guidance is needed in Rule, whether it be in the text of the Rule or in a Comment to the Rule, as to how to calculate time under Criminal Rule 28.1(b)(2)(A) and (B). The Clerk also maintains that Rule 28.1(b)(3) is also in need of clarification. The Clerk will highlight some of the challenges it sees with the current language and why it maintains additional information is needed to guide staff. Absent clarification, the Clerk fears that out of an abundance of caution, staff will default to maintaining exhibits and illustrative aids in criminal cases almost on a “permanent” basis, or until the defendant completes his/her sentence or dies, to not risk having disposed of exhibits prematurely.

A. Simplification of “Subject to Modification” – Exhaustion of State Court Remedies

The Clerk believes that the simplification effort undertaken by the Advisory Committee is

a significant improvement over what is in current Rule 28.1 regarding “subject to modification,” and notes, as did Mr. Byers in his Petition, that the Advisory Committee’s Report indicated that there was not a clear understanding of what “exhausting all state remedies” meant. And while the “Definition of ‘All State Court Remedies Are Exhausted’ ” is extremely helpful, and necessary, the definition still leaves open the following questions that the Clerk maintains need to be addressed, either in the Rule 28.1, or in a Comment to Rule 28.1.

The retention period if the trial court dismisses without prejudice the charges against the defendant, and no notice of appeal is filed.

Rule 28.1(b)(3)(B) and (C) provide for a “post-trial motion,” but it is not clear from the Rule what all is encompassed by a “post-trial motion.” In other words, one could assume this is limited to the remedies available under Rule 24 of the Arizona Rules of Criminal Procedure. But the Clerk does not feel comfortable making that assumption, especially considering post-conviction relief remedies available under Rules 32 and 33 of the Rules of Criminal Procedure. Clarification is warranted to provide whether Rule 32 and Rule 33 post-conviction relief is to be included as a “post-trial motion.”

And if clerks of court are to retain exhibits through the post-conviction relief process, and even if it were to try and incorporate the time frames set forth under Rules 32 and 33, there are exceptions that allow for a petition for post-conviction relief to be filed after the initial deadline has passed. The exceptions included newly discovered materials facts or evidence; a significant change in the law that would affect the case; and the failure to file a timely petition for post-conviction relief was not the fault of the defendant, etc. As Rule 32.1 is currently written, it is not clear what obligations clerks of court have regarding maintaining exhibits during any post-conviction proceedings, and when, clerks may dispose of exhibits in cases where the defendant

has filed for post-conviction relief.

It is also the understanding of the Clerk that a petition for post-conviction relief may be filed with or without a direct appeal, and that defendants are not limited to filing a single petition for post-conviction relief. Just this past week, the Arizona Supreme Court noted in its opinion issued in *State v. Traverso*, 2025 WL 2699486, the complexities associated with determining issues related to Criminal Rule 32.

Rule 28.1 currently does not discuss petitions for post-conviction relief, and the Clerk maintains that there needs to be additional guidance incorporated into the Rule, or through a Comment to the Rule, with respect as to how the time frames associated with filing petitions for post-conviction relief, as well as how the exceptions to the deadline for filing a timely petition for post-conviction relief, records retention, specifically as relates to exhibits.

Another area of concern the Maricopa County Clerk has relates to the right of a defendant to file a writ of habeas corpus in state court, and what impact, if any, that should have on records retention, specifically as relates to exhibits.

Additionally, the Clerk seeks additional rule-based guidance as to whether evidence retention as relates to capital cases should be treated differently.

B. Simplification of “Subject to Modification” – Exhaustion of All Federal Remedies

As noted above, Rule 28(b)(3) sets forth a definition of “All State Court Remedies Are Exhausted,” but the Rule does not provide a definition for exhaustion of federal remedies. And while this may be difficult to define, absent a definition, the Clerk believes that that clerks of court may feel obligated or to retain exhibits for the full duration of a defendant’s sentence in cases, or until such time as the defendant dies.

The Clerk assumes that when referring to “federal remedies,” that is to mean the

constitutional right to seek habeas corpus relief in federal court, even if the defendant was convicted of a state crime in state court. In preparation of drafting this Comment, the Maricopa County Clerk performed some preliminary research regarding the federal statutes and rules governing federal petitions for writs of habeas corpus, including a review of 28 U.S.C. § 2254 as well as the Anti-Terrorism and Effective Death Penalty Act (AEDPA), to better understand the legal standards and procedures surrounding habeas corpus actions in federal court as relate to state court actions. It appears that 28 U.S.C. § 2254(d)(1) provides for a one-year statute of limitations, and provides for four possible time calculations, with the limitations period running from the latest of the four. However, unlike many other statutes of limitation, it is the Clerk's understanding that the one-year federal habeas corpus statute of limitations can start and stop several times. *See Nino v. Galaza*, 183 F.3d 1003, 1006-07 (9th Cir. 1999).

Perhaps it is due to the complexities associated with federal remedies that no definition was included in Rule 28.1(b)(2)(B), but that would only emphasize the need for more detailed and clarifying instruction, especially with non-lawyers being responsible for evidence retention and management.

It also appears that "equitable tolling" is something to be considered when look at the time for filing a petition for a writ of habeas corpus relief. *See Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002).

Absent some definitional guidance regarding what constitutes "all federal remedies" and how time should be calculated for the retention of exhibits when a writ of habeas corpus has been or could be filed, the Clerk is concerned that exhibits in criminal cases will need to be maintained indefinitely, so as to avoid any "guess work" regarding federal habeas corpus remedies. This indefinite retention may defeat the purpose of the work of the Advisory Committee on Evidence

Retention, especially as it relates to digital evidence.

C. Conclusion

The Maricopa County Clerk respectfully requests that the Supreme Court consider its concerns as set forth above. And if the Supreme Court does not believe the concerns warrant additional amendments to Rule 32.1 of the Rules of Criminal Procedure, the Clerk asks that a Comment be drafted and included for publication with the Rule providing additional guidance.

DATED this 1st day of October, 2025.

/s/ Joseph Malka
Hon. Joseph Malka, Clerk
Superior Court in and for Maricopa County

This Comment has been filed via electronic filing of in accordance with deadlines set forth in the Supreme Court's July 16, 2025 Order.

A copy of this Comment has been e-mailed to the Petitioner at the following:

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