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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of

Petition to Rescind R-25-0044
Relating to Records Retention and
Disposition in Criminal Cases

No.

**PETITION UNDER RULE 28,
RULES OF THE SUPREME COURT
(Expedited Consideration Requested)**

Rule 28.1(b)(2)(A) of the Arizona Rules of Criminal Procedure was amended on an emergency basis on August 28, 2025, and made permanently effective on January 1, 2026. The Rule redefined “Subject to Modification” to authorize disposition of certain records in criminal cases, “one year after exhausting all state court remedies, if the defendant did not file a petition for a writ of habeas corpus in federal court.” This redefinition violates federal due process principles, affects substantial rights, and will result in fundamental miscarriages of justice in some instances. Consideration of this petition on an expedited basis is requested to prevent the premature destruction of court records, as Rule 28.1(b)(2)(A) does not protect the ability to adjudicate constitutional challenges to state convictions in state and federal courts.

Discussion

Federal law provides that state procedures have to be adequate to vindicate constitutional rights.¹ Further, their adequacy is not within the States prerogative to decide; adequacy is itself a federal question.² Rule 28.1(b)(2)(A) is a state procedure that on its face does not adequately protect federal constitutional rights.

A. Rule 28.1(b)(2)(A) does not take into consideration that the 1-year limitation period to file a federal habeas corpus petition has multiple start dates.

The determination that a case is final — or “no longer subject to modification” — is too narrow under Rule 28.1(b)(2)(A). The Rule attempts to accommodate the general principle that a federal habeas corpus petition must be filed within a year of a state court conviction becoming final on direct appeal. However, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) permits federal habeas corpus filings from four disparate events:

- (A) One year from the date a state court conviction becomes final after the direct appeal; or
- (B) One year from the date a state-created impediment is removed; or
- (C) One year from the date the Supreme Court states that one of its decision is retroactive; or

¹ *Carter v. Illinois*, 329 U.S. 173, 175-76 (1946).

² *Lee v Kemna*, 534 U.S. 362, 375 (2002); *accord*, *Cruz v. Arizona*, 598 U.S. 17, 25 (2023); *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *Cone v. Bell*, 556 U.S. 449, 465 (2009).

- (D) One year from the date newly discovered facts could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D).³

Accordingly, Rule 28.1(b)(2)(A) does not take into consideration the other events that trigger the deadline to file a federal habeas petition under the statute. Federal courts also equitably toll the statute of limitations if the petitioner shows they were diligent in pursuing their rights and some extraordinary circumstance prevented the filing of a habeas petition within a year.⁴ The Supreme Court of the United States has also held that an actual innocence claim is not subject to ADEPA's statute of limitations, notwithstanding the existence of the procedural bar to relief.⁵ Moreover, federal habeas corpus proceedings may be reopened long

³ See, *Pace v. Diguglielmo*, 544 U.S. 408, 416 n. 6 (2005) (“Similarly, § 2244(d)(1) provides that a “1-year period of limitation shall apply to an *application* for a writ of habeas corpus.” (Emphasis added.) The subsection then provides one means of calculating the limitation with regard to the “application” as a whole, § 2244(d)(1)(A) (date of final judgment), but three others that require claim-by-claim consideration, § 2244(d)(1)(B) (governmental interference); § 2244(d)(1)(C) (new right made retroactive); § 2244(d)(1)(D) (new factual predicate)”; see also, *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir. 2000) (“In defining the one-year statute of limitations in 2244(d), Congress explicitly laid out three circumstances under which the statute of limitations would begin to run after the date on which the prisoner’s judgment became final. See 2244(d)(1)(B),(C),(D).”).

⁴ *Holland v. Florida*, 560 U.S. 631 (2010); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); *Irwin v. Veterans Administration*, 498 U.S. 89 (1990); *Rasberry v. Garcia*, 448 F.3d 1150, 1153 (9th Cir. 2006).

⁵ *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

after judgments are final under Rule 60(b) of the Federal Rules of Civil Procedure.⁶

In 28 U.S.C. § 2244(d)(1)(B), Congress provided a procedural gateway to federal habeas corpus when state action impedes petitioners from vindicating their federal constitutional rights after sustaining a conviction in state courts. A state could impede a petitioner's access to federal habeas by not providing notice of a final ruling to the petitioner, by refusing to overrule a state court precedent with a Supreme Court decision, or by refusing to rule on a properly presented constitutional claim.⁷ The procedural gateway is also available when prison officials withhold or destroy legal files, place prisoners in solitary confinement during AEDPA's filing period, and fail to make legal materials available to state prisoners. State-action takes many forms and the one-year filing deadline encapsulated in 28 U.S.C. § 2244(d)(1)(B) only begins to run once a state-created impediment is removed.

Under the current version of Rule 28.1(b)(2)(A) a prisoner who was not properly notified of a final state court ruling would be deprived of the record maintained by state courts that could have been used to substantiate a properly and

⁶ *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005).

⁷ See e.g., *Cruz v. Arizona*, 598 U.S. 17, 25 (2023); *Lackawanna County Dist. Att'y v. Coss*, 532 U.S. 394, 405 (2001); *Earl v. Fabian*, 556 F.3d 717, 723-24 (8th Cir. 2009) (collecting cases); *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000).

timely filed Petition for Habeas Corpus Relief. Similarly, a prisoner who exercised due diligence to discover newly available facts would not have access to evidence that had been in the possession of the state court after a year. Because the case finality definition this Court adopted in Rule 28.1(b)(2)(A) does not take into consideration that AEDPA's 1-year limitation period has multiple start dates, it does not adequately protect federal constitutional rights.

B. Rule 28.1(b)(2)(A) Itself Is a State-Credited Impediment to Federal Habeas Corpus

State prisoners whose court records are prematurely destroyed fall squarely within the category of petitioners able to establish in federal court that “there is an absence of available State corrective process” “or circumstances exist that render such process ineffective to protect the rights of the applicant.” 28 U.S.C. 2254(b)(1)(B)(i)-(ii). Habeas litigation is ordinarily limited to the record that was before the state court that adjudicated the claim on the merits⁸ but if the state-court record for a defaulted claim is undeveloped due to state-court action, the petitioner is able to show that factual development in federal court is appropriate.⁹

⁸ *Shinn v. Martinez Ramirez*, 596 U.S. 366 (2022); *Cullen v. Pinholster*, 563 U. S. 170, 180 (2011); *Harrington v. Richter*, 562 U. S. 86, 102-03 (2011).

⁹ *Martinez Ramirez*, 596 U.S. at 377-78 (“Ordinarily, a state prisoner satisfies this exhaustion requirement by raising his federal claim before the state courts in accordance with state procedures. If he does, so, a federal habeas court may hear his claim, but its review is highly circumscribed. In particular, the federal court may review the claim based solely on the state-court record, *see Cullen v.*

Rule 28.1(b)(2)(A) is a rule of criminal procedure wherein state-actors have arbitrarily selected one of four statutory alternatives to trigger the destruction of court records. The premature destruction of records will impede petitioners from contesting their federal constitutional rights. The deadline to commence federal habeas corpus proceedings will not begin to run until after Arizona removes this impediment to filing.

C. The Rule Does Not Account for State Court Remedies that Render a Verdict Subject to Modification.

Rule 28.1(b)(2)(A) also violates federal procedural due process principles because the event selected to trigger disposition of certain court records fails to take into account that Arizona Rules of Criminal Procedure, Rules 32 and 33, themselves permit petitioners to initiate *successive* post-conviction relief proceedings after “all state court remedies are exhausted.” *See e.g.*, Rule 32.1(b) (subject matter jurisdiction); Rule 32.1(c) (sentence imposed not authorized by law); Rule 32.1(d) (custody after expiry of sentence); Rule 32.1(e) (newly discovered evidence); Rule 32.1(f) (failure to file a notice of appeal); Rule 32.1(g)

Pinholster, 563 U. S. 170, 180 (2011), and the prisoner must demonstrate that, under this Court’s precedents, no “fairminded juris[t]” could have reached the same judgment as the state court, *Harrington*, 562 U. S., at 102; see §2254(d).”) and (“When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse. Likewise, if the state-court record for that defaulted claim is undeveloped, the prisoner must show that factual development in federal court is appropriate.”); *Schriro v. Landrigan*, 550 U. S. 465, 474 (2007).

(significant change in the law); Rule 32.1(h) (evidentiary sufficiency); Rule 32.2(a)(3) (claims raising a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant); Rule 32.17 (Post-Conviction DNA Testing).

Both Rule 32.1(e) and § 2244(d)(1)(D) permit petitioners to contest their convictions with newly discovered evidence at *any* time. Rule 32.17 likewise permits petitioners to request DNA testing at *any* time. The passage of time does not cure invalid convictions or those obtained with discredited forensic testimony.¹⁰ Similarly, Rule 32.1(h) is a procedural gateway that allows petitioners to file successive petitions to litigate the prosecution's failure to establish every element of an offense.

In addition to these rules, this Court has also provided for relief in its case law by holding that petitioners may file Rule 32 petitions to raise successive ineffective assistance of counsel claims.¹¹ Disposing of evidence after petitioners have completed a first round of state court remedies, even though other state-created avenues for relief are available, deprives state prisoners of procedural due

¹⁰ *In re Winship*, 397 U. S. 358, 364 (1970) and *Mullaney v. Wilbur*, 421 U. S. 684, 692-96 (1975); *see also*, *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Glossip v. Oklahoma*, 604 U.S. 226 (2025); *Bieganski v. Shinn*, 149 F.4th 1055 (9th Cir. 2025); *State v. Krone*, 182 Ariz. 319, 897 P.2d 621 (1995).

¹¹ *State v. Bennett*, 146 P.3d 63, 66-67 ¶¶ 13-16 (2006); *State v. Traverso*, 576 P.3d 97 (2025).

process, affects substantial rights, and may result in fundamental miscarriages of justice in some instances.¹²

D. State Actors Are Not Equipped to Calculate Federal Habeas Corpus Deadlines.

Rule 28.1(b)(2)(A) should also be rescinded because it requires time-intensive, case-specific calculations that state actors should not make on behalf of persons convicted in the state courts of Arizona. The Rule does not specify how the administrative branch of the court or a county court clerk's office will determine whether a federal petition has been filed. The Clerk of the Superior Court in and for Maricopa County expressed these concerns in its October 1, 2025 Comment to the Petition to Amend Rule 28:

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

¹² The selection of a 1-year window to dispose of certain court records is troubling as state actors previously removed a 1-year filing deadline that prohibited petitioners from receiving relief on any ground that was not raised within one year of the date of the mandate affirming a conviction. Compare A.R.S. § 13-4232(A)(4) (1975) and A.R.S. § 13-4232(A) (1992).

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).

In 2004, the Supreme Court considered—and rejected—a proposal to impose an AEDPA-calculation function on the federal judiciary:

The second advisement would force upon district judges the potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation and calculation of whether the AEDPA limitations period has already run or will have run by the time the petitioner returns to federal court. As the dissent below recognized, district judges often will not be able to make these calculations based solely on the face of habeas petitions. 330 F. 3d, at 1108. Such calculations depend upon information contained in documents that do not necessarily accompany the petitions. This is so because petitioners are not required by 28 U. S. C. §2254 or the Rules Governing §2254 Cases to attach to their petitions, or to file separately, state-court records. See 1 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 15.2c, p. 711 (4th ed. 2001) (“Most petitioners do not have the ability to submit the record with the petition, and the statute and rules relieve them of any obligation to do so and require the state to furnish the record with the answer”). District judges, thus, might err in their calculation of the statute of limitations and affirmatively misinform pro se petitioners of their options.

Pliler v. Ford, 542 U. S. 225, 232-33 (2004). More than affirmative misinformation is at issue where state-actors dispose of evidence prematurely. Notwithstanding the ubiquitous application of Arizona’s Rule of Preclusion in

Rule 32 proceedings,¹³ court administrators do not have the ability to discern whether a person convicted in state courts has a procedural or equitable avenue to contest a conviction on federal constitutional grounds.

E. Expedited Consideration of This Petition is Necessary.

The prior iteration of Rule 28.1(b)(2)(A) better accommodated the various avenues for relief from a constitutionally infirm criminal conviction. Under the prior version of the Rule, premature destruction of relevant court records was less likely, for example, of DNA evidence, exhibits offered but not admitted, written stipulations, or myriad other types of records that may later be found material and admissible in federal habeas corpus proceedings or under successive petitions for post-conviction relief in state court.

Expedited consideration of this petition is requested in order to prevent the premature destruction of court records that could later be found relevant and admissible in state or federal court. Under Arizona Supreme Court Rules Rule 28 for the Adoption, Amendment and Abrogation of Court Rules, this petition cannot be considered until August or September of 2027, without expedited consideration,

¹³ *State v. Traverso*, 576 P.3d 97, 104 ¶ 27 (2025) (“The [Rule 32] Task Force, created by administrative order of this Court, was charged with “identify[ing] possible substantive changes that improve upon the objectives of Rule 32 and the post-conviction relief process.” *Id.* Part of the rationale behind creating the Task Force, though not explicitly referenced in the administrative order, was the need to address ongoing confusion around Arizona’s preclusion rules.”).

and the earliest Rule 28.1(b)(2)(A) could be revised would be January 1, 2028. By that point, the various county clerk offices will have destroyed state court records necessary for federal habeas and successive PCR proceedings for two years. Prospective petitioners with state court convictions that are still properly subject to modification will have lost relevant evidence due to a state-created impediment, namely the premature destruction of state court records. In order to protect the federal constitutional rights of habeas petitioners, this petition should be considered on an expedited basis.

Conclusion

“State and federal courts are ‘equally bound to guard and protect rights secured by the constitution,’” *Ex parte Royall*, 117 U.S. 241, 251 (1886),¹⁴ and this Court has consistently held that “[a] rule of court prescribes a procedural course of conduct that litigants are required to follow, the failure to comply with which may deprive the parties of substantial rights.” *Hare v. Superior Court*, 652 P.2d 1387, 1389 (1982).¹⁵ In Rule 1.2 of the Arizona Rules of Criminal Procedure, this Court further provides that the Rules should be construed to “protect the fundamental rights of the individual while preserving the public welfare.” Rule 28.1(b)(2)(A) does not protect the ability to adjudicate constitutional challenges to state

¹⁴ *Accord, Harrington v. Richter*, 562 U. S. 86, 103 (2011); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

¹⁵ *Hedlund v. Sheldon*, 840 P.2d 1008, 1011 (1992).

convictions under state law. The current rule should be rescinded and the former parameters for retention of state court records be reinstated.

RESPECTFULLY SUBMITTED this 28th day of January 2026.

By: /s/Katia Méhu
KATIA MÉHU
Petitioner

ELECTRONICALLY filed
on the Court Rules Forum of the Arizona Supreme Court
this 28th day of January, 2026.