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Justices of the Arizona Supreme Court:

Pending before the Court is a proposed rule change to amend Rule 32.4 of the Arizona Rules of Criminal Procedure to extend the time to file a PCR petition in capital cases to 18 months from when this Court files its Notice of Post-Conviction Relief. R-13-0010. While it is reasonable to extend the initial period for filing beyond the current 120 days, 18 months is far too long. In my view, a more reasonable period is 180 days, or roughly six months.

This view represents my thoughts and not those of the Arizona Attorney General's Office. My view is based on my experience as a prosecutor who has tried capital cases long ago, but who has reviewed countless capital cases while representing the State on appeal, in state post-conviction proceedings, and in federal habeas. This experiences spans well over 35 years.

In death penalty litigation, our obligation is to make sure that a case involving the ultimate penalty is fairly and efficiently administered, respecting the rights of the defendant, the public, and the victims. The most important function of the criminal justice system is to correctly separate the guilty from the innocent in a constitutionally fair manner. The trial is the "main event," as the United States Supreme Court has repeatedly acknowledged, for accomplishing this. This is where Arizona has properly committed the resources, including funding a defense team, providing for a mitigation investigation and necessary experts. The post-conviction proceeding is a collateral attack upon a final judgment, reserved for those cases where "justice has gone awry." *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984).

The following four points explains why 180 days are adequate with the opportunity for extensions based upon a demonstration of extraordinary cause:

1. The types of claims that can be raised in a Rule 32 proceeding are very limited. See Ariz. R. Crim. P. 32.1. Claims that could have been raised, or were raised on direct appeal, are precluded. Rule 32.1(a)(3). Claims that trial or appellate counsel were constitutionally ineffective are constrained by *Strickland v. Washington*, 466 U.S. 668 (1984). Given the requirements Arizona uses to qualify attorneys in capital cases, Ariz. R. Crim. P. 6.8, one would not anticipate there would be many colorable claims under *Strickland*. After all “[s]urmounting *Strickland’s* high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473, 1485 (2010). In other words, the trial counsel’s performance must be so obviously incompetent and the prejudice so apparent that *Strickland’s* legal bar is met, something that is not expected with Rule 6.8 qualified attorneys and if it occurred, it should be readily detectible.

2. Capital cases have survived the adversarial trial test and direct review. The prisoner is no longer considered innocent and the State and the victims have strong important interests in having the case reach a just conclusion. See *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (recognizing those interests). Conversely, at this point in the litigation, the prisoner has a strong interest in delay. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) (noting how capital prisoners might deliberately engage in dilatory tactics). Delay in capital cases has outraged the public and caused Congress to impose more stringent procedures in federal habeas review. The post-conviction procedures should be efficient and fair, yet designed to prohibit unnecessary delay.

3. Filing the post-conviction petition is not the end of the litigation, but the beginning. Once a defendant files a PCR petition, formal discovery is possible and for good cause the petition can be amended to add claims. Ariz. R. Crim. P. 32.6(d); *Canion v. Cole (Thomas)*, 210 Ariz. 598, ¶ 19, 115 P.3d 1261 (2005). Moreover, the pre-filing time limit of 180 days (6-months) recognizes that the period could be extended because not all cases are alike.

4. PCR counsel is not beginning from scratch. PCR counsel has the opportunity to speak with the trial and appellate attorneys. Counsel also has the benefit of the Arizona Supreme Court opinion, appellate briefs, and trial transcripts and record on appeal as well as the police reports and witness interviews.

The petition to amend Rule 32.4 appears to present basically three arguments in support of the change from 120 days. The first argument is predicated on the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) (“Guidelines”). The second argument is based on the recent experience in Maricopa County. The third is based on rules from other states.

Reviewing the arguments in reverse order:

Other States: The petition to amend Rule 32.4 cites three rules from other states. Without a complete understanding of another state’s procedural rules and actual practice, it is difficult to compare those rules with the Arizona rules. For example, the petition cites to Florida Rule 3.850. However, that rule is concerned with “Motion to Vacate, Set Aside, or Correct Sentence.” The Florida Rule closest to Arizona’s Rule 32 is their Rule 3.851 (Collateral Relief after Death Sentence has been Imposed and Affirmed on Direct Appeal). Under 3.851(d)(1) “[a]ny motion to vacate judgment of conviction and sentence of death *shall* be filed by the prisoner within 1 year [*not* 2 years] after the judgment and sentence become final.” *Only* the Florida Supreme Court can extend the time based on a showing of “good cause for counsel’s *inability* to file the postconviction pleadings within the 1-year period established by this rule.” Rule. 3.851(d)(5) (emphasis added).

The Pennsylvania rule provides for the postconviction relief petition to be filed within 1-year of when the judgment becomes final with exceptions similar to the federal statute of limitations. 42 Pa.C.S.A. § 9545 (b)(1). However, where the prisoner requests an evidentiary hearing, the petition must include witness information including the substance of testimony and material documents related to it. 42 Pa.C.S.A. § 9545(d)(1). The Arizona Rule has no such requirement.

The correct citation for the Tennessee statute of limitation is TN ST § 40-30-102(a). The statute of limitation is one year in which to file a postconviction petition. However, the Tennessee procedure requires that all capital cases be *completed within 1 year* of the filing of the petition. § 40-30-111(d). Thus, the entire process is limited to two years. Furthermore, it has an additional enforcement mechanism. “Copies of all orders extending deadlines in capital cases shall be sent to the administrative office of the courts. The administrative office of the courts shall report annually to the general assembly on the compliance by the courts within the time limits established for capital cases and the reason for noncompliance, if any.” *Id.* The Arizona rules do not have any comparable provisions.

Current time: The current approach in Arizona is not working. It is not perfectly clear why it is not working—if the problem is the current version of the time limits or how they are being applied. When Maricopa County had the serious backlog of capital cases, it was not clearly a problem with the existing time limits, but rather their lack of enforcement. It was not until the Honorable Gary Donahoe (Ret.) decided to enforce the then existing speedy trial rules in conjunction with other measures that the Maricopa County backlog of capital cases were reduced. ARIZONA ATTORNEY, “*Capital Crisis Averted*” 19-26, at 22 (Nov. 2011). Simply because it now takes over 18 months to file a postconviction relief petition in Maricopa County does not mean that it is in the public’s best interest or that it is necessary in every case. Many other factors could account for such extraordinary delay. Apparently, there has not been an effort to analyze the delayed cases to determine if there is a common problem.

ABA Guidelines: This Court recognizes attorneys doing capital work are expected to “be familiar with and guided by” the performance standards in the Guidelines understanding that some Guidelines may not be applicable given Arizona practice or the circumstances of the case. Ariz. R. Crim. P. 6.8(b)(1)(iii); (c)(4); 2006 Cmt. . In discussing the 1980 much shorter version, the United States Supreme Court expressly stated:

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would *interfere with the constitutionally protected independence of counsel* and restrict the wide latitude counsel must have in making tactical decisions

Strickland, 466 U.S. at 688-89 (emphasis added). The petition to amend Rule 32.4 states “[c]ounsel *must review* the entire trial court record, including thousands of pages of transcripts and numerous exhibits. In addition, the investigation and development of mitigation evidence continues by defense counsel during the PCR.” (emphasis added.) If this was a procedural rule required in every case, such a rule would certainly interfere with counsel's constitutionally protected independence. Nor would it make good sense or be good lawyering. After all, “litigation is a ‘winnowing process,’ and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008) (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993)).

If for example, the issue of guilt is overwhelming in a case,¹ what benefit to the defendant or the public purse to spend hours reading the guilt phase transcripts? Any error found there would be precluded or harmless. Moreover, even if the trial or appeal attorney's failure to raise the purported error was constitutionally deficient, it would be pointless to pursue because it would not be possible to prove prejudice under *Strickland*.

Even if the resources were unlimited, and no other party had an interest in the case, because cases are unique it would still make little sense to adopt literally

¹ See, e.g., *State v. Speer*, 221 Ariz. 449, 212 P.3d 787 (2009); *State v. Womble*, 225 Ariz. 91, 235 P.3d 244 (2010); *State v. Manuel*, 229 Ariz. 1, 270 P.3d 828 (2011); *State v. VanWinkle*, 229 Ariz. 233, 273 P.3d 1148 (2012).

the Guidelines in every death penalty post-conviction case. However, the resources are not unlimited—quite the opposite, they are extremely limited in terms of time and money. To waste time doing obviously unproductive tasks does not advance the interest of the defendant or the public. If there is a claim that would entitle a defendant to relief, it is important for all that it is resolved quickly. Worst, if cases that do not warrant the time or the money consume the resources, the cases that do warrant such expenditures could be crowded out.

The current capital Rule 32 culture appears to expect compliance with the Guidelines in every case in every respect regardless of the circumstances of the case or resources. While in a few cases the Supreme Court has pointed to the Guidelines in judging the reasonableness of *trial* attorney's actions, the Court has not applied them in the context of post-conviction relief proceedings in any context. In the cases where the Court has cited to them in the context of *trial* attorney's performance, the Court has emphasized that *Strickland's* reasonableness standard is the appropriate measure. For example in *Strickland*, the Court expressly stated “[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Strickland*, 466 U.S. at 693. “[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgment.” *Id.* at 691.

The Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003), emphasized that “*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant *at sentencing*. Nor does *Strickland* require defense counsel to present mitigating evidence *at sentencing in every case*. Both conclusions would interfere with the ‘constitutionally protected independence of counsel’ at the heart of *Strickland*.” *Id.* at 533 (emphasis added).

Given our limited resources and balancing the interests of the defendant, the public, and the victims, the culture should not be that the postconviction proceeding is a “do-over” of the prior litigation—treating the limited nature of

collateral review as if it is the main event. Extending the base-time frame to 18 months, or even a year, assumes a thorough review of all postconviction cases cannot be completed in less than 18 months. For example, surely an objective assigned attorney faced with a case where the evidence of guilt is overwhelming and the defendant had waived mitigation could complete a reasonable thorough review of the case in less than 6 months. Reasonable deadlines are necessary to preserve the rights of the public and victims in bringing the case to a prompt and final disposition, at least in state court. If the defendant can show proper cause for additional time—that there is a reason for the delay that outweighs the interests of the public and the victims—then the trial court can grant the motion for a reasonable period of time.

Respectfully submitted

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