

1 John Furlong, Bar No. 018356
General Counsel
2 State Bar of Arizona
4201 North 24th Street, Suite 100
3 Phoenix, Arizona 85016
(602) 252-4804

4 **BEFORE THE SUPREME COURT OF**
5 **THE STATE OF ARIZONA**

6 In the Matter of

Supreme Court No. R-14-0010

7 PETITION TO AMEND RULES
31.2, 31.4, 31.13, 32.4, and 32.9
8 ARIZONA RULES OF CRIMINAL
PROCEDURE

**Comment of the State Bar of Arizona
in Opposition to Petition No.
R-14-0010 to Amend Rules 31.2, 31.4,
31.13, 32.4, and 32.9, Arizona Rules of
Criminal Procedure**

9
10 Petitioner asks this Court to change the way that capital post-conviction cases
are processed because it believes the significant delay between the trial and the post-
11 conviction proceeding affect the reliability of the post-conviction proceeding. The
12 State Bar of Arizona does not believe this is a wise, constitutional or necessary change
and, as such, opposes this change because the proposed amendment would defeat the
13 defendant's long-standing constitutional right to raise an ineffective-assistance-of-
14 appellate-counsel claim.

15 **A. The Sixth Amendment Right to Effective Assistance of Counsel**

16 In *State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002), the Arizona Supreme Court
determined that raising post-conviction claims prior to or simultaneous with claims
17 raised on direct appeal was "unworkable," saying:

18 Accordingly, we reiterate that ineffective assistance of counsel claims
are to be brought in Rule 32 proceedings. Any such claims
19 improvidently raised in a direct appeal, henceforth, will not be
addressed by appellate courts regardless of merit. There will be no
20 preclusive effect under Rule 32 by the mere raising of such issues. The

1 appellate courts simply will not address them. This ensures criminal
2 defendants a timely and orderly opportunity to litigate ineffectiveness
claims and, we believe, promotes judicial economy by disallowing
piecemeal litigation.

3 202 Ariz. at 3, 39 P.3d 527.

4 Although acknowledging *Spreitz's* "unworkable" language, Petitioner reasons
5 that claims brought pursuant to Rule 32 — including but not limited to claims of
ineffective assistance of counsel — should be resolved prior to the direct appeal in order
6 to avoid significant delays "both in (a) the appointment of post-conviction counsel, and
7 (b) the time that elapses (frequently more than a year) from the appointment of post-
conviction counsel to the filing of a PCR [petition for post-conviction relief] petition."
8 (Petition, p. 4)

9 The petition simply proposes a constitutionally untenable procedure. A claim of
10 ineffective assistance of counsel asserts a denial of the Sixth Amendment right to
counsel, a right that guarantees not only effective assistance of trial counsel but
11 *appellate counsel*. *Strickland v. Washington*, 466 U.S. 668 (1984). While a defendant
12 can raise a claim of ineffective assistance by pointing to specific errors made by trial
counsel, *United States v. Cronin*, 466 U.S. 648, 666 (1984), **due process also requires**
13 **that a defendant receive effective assistance of counsel in exercising his rights on**
14 **appeal**. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *State v. Berlat*, 146 Ariz. 505, 509,
15 707 P.2d 303 (1985); *State v. Bolton*, 182 Ariz. 290, 896 P.2d 830 (1995); *State v.*
Carver, 160 Ariz. 167, 175, 771 P.2d 1382 (1989); *State v. Schackart*, 190 Ariz. 238,
16 947 P.2d 315 (1997); *see also Mayo v. Henderson*, 13 F.3d 528, 533 (2nd Cir. 1994)("a
17 petitioner may establish constitutionally inadequate performance if he shows that
[appellate counsel] omitted significant and obvious issues while pursuing issues that
18 were clearly and significantly weaker"), *cert. denied*, 115 S.Ct. 81 (1994); *Matire v.*
19 *Wainwright*, 811 F.2d 1430, 1438 (11th Cir.1987) (court's finding of deficient
20 performance "is bolstered by the fact that appellate counsel's brief on direct appeal

1 raised only a single, weak issue, notwithstanding the fact that a substantial, meritorious
2 Fifth Amendment issue was obvious upon even a casual reading of the trial transcript”);
3 *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985)(“Had appellate counsel failed to raise
4 a significant and obvious issue, the failure could be viewed as deficient performance.”)

5 Thus, the flaw in Petitioner’s assertion that the “proposed amendments would
6 replace Arizona’s ‘initial-review collateral proceeding’ and allow for direct review of
7 all claims of ineffective assistance of counsel whether raised in the post-conviction
8 proceeding or on direct review” is readily apparent. (Petition, p. 10)

9 Petitioner fails to mention, much less address, the unavoidable fact that a petition
10 for post-conviction relief filed and decided *prior to* the direct appeal deprives a
11 convicted capital defendant his right to challenge the effectiveness of appellate counsel
12 as guaranteed by the Sixth Amendment of the United States and Arizona constitutions.
13 Claims of ineffective assistance of appellate counsel may only be levied *after* the direct
14 appeal process is exhausted. Moreover, claims not raised in a capital petition for post-
15 conviction relief are precluded from being raised for the first time in capital *habeas*
16 *corpus* proceedings; thus, a capital defendant’s failure to raise a claim of ineffective
17 assistance of appellate counsel during state post-conviction proceedings precludes the
18 claim in any federal court thereafter. For this reason alone the petition proposes a
19 procedure which is constitutionally unworkable.

20 **B. Delay Borne From Appointment of Post-Conviction Counsel**

While Petitioner correctly notes the historic delays in the appointment of capital
post-conviction counsel following affirmance of the conviction and death sentence on
direct appeal, the delay is borne of a shortage of qualified counsel with the necessary
time and inclination to undertake the representation in capital post-conviction
proceedings. Petitioner’s proposal offers nothing to remedy this pragmatic difficulty; it

1 remains regardless of whether the post-conviction proceeding occurs before or after the
2 direct appeal.

3 **C. Fading Memories And Lost, Destroyed or Misplaced Evidence**

4 Petitioner posits that “[i]t is critically important to discover any constitutionally
5 deficient aspect of [trial] counsel’s performance before witnesses’ memories have faded
6 and before evidence becomes stale or is ‘lost, destroyed, or misplaced.’” (Petition, pp.
7 7-8) Although persuasive at first blush, this rationale fails to justify the denial of a
8 capital defendant’s constitutional right to effective assistance of *appellate counsel* on
9 direct appeal.

10 Indeed, Arizona has held that a criminal defendant’s motion to dismiss an
11 indictment *with prejudice* is not appropriate under the generalized finding that
12 witnesses’ memories fade and evidence is lost with the lapse of time, as such factors do
13 not satisfy the “interests of justice” requirement of Rule 16.6, Ariz. R. Crim. P.
14 (dismissal “with prejudice” may only occur when doing so is in the “interests of
15 justice”). *State v. Granados*, 172 Ariz. 405, 407, 837 P.2d 1140 (App.1991). Where
16 dismissal of an existing indictment is warranted, dismissal occurs *without prejudice*
17 thereby affording the State the opportunity to re-file the charges notwithstanding the
18 fact that memories fade and evidence is lost with the passage of time. *Ibid.*

19 From a purely pragmatic standpoint, the Arizona Rules of Criminal Procedure
20 and state statutes are designed to prevent the destruction and/or loss of evidentiary
items. Rule 28.2(d), Ariz. R. Crim. P., requires law enforcement agencies to notify the
prosecutor and the Office of the Attorney General before disposing of any evidence
seized or otherwise obtained in connection with a criminal prosecution, and provides the
prosecutor the discretion to preserve the evidence in one of three ways. Subsection (e)
of the same rule requires “the person or agency” to serve a notice of disposal upon “any
person, and his or her counsel, against whom the item has been or may be used as

1 evidence” at least 10 days prior to disposing of an item under the rule, and within 10
2 days thereafter permits that person (including counsel) to “request a stay of disposal
3 until after trial or request to examine, test or analyze or otherwise make his or her own
4 record of the item.” Subsection (f) of the rule permits a court having jurisdiction of the
5 case to stay disposal of any item for a reasonable time upon the request of any party or
6 on its own initiative.

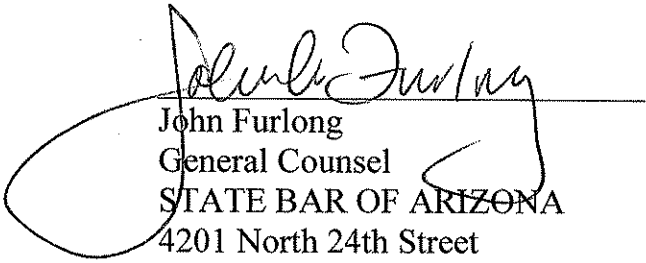
7 Items admitted into evidence as exhibits in capital cases are retained by the
8 Superior Court indefinitely, and transferred to the state archives and/or the seizing
9 agency upon execution or natural death. *See* Arizona Code of Judicial Administration, §
10 3-402: Superior Court Records Retention and Disposition.

11 Last, with respect to material evidence or information discovered by law
12 enforcement or the prosecutorial agency *post-conviction*, the newly adopted sections of
13 Ethical Rule 3.8 require prosecutors to maintain and disclose same — and that evidence
14 is thereby preserved. In light of the aforementioned, the proposal to re-order post-
15 conviction proceedings to occur before the direct appeal has no impact on the rule or
16 law governing the preservation of existing evidence in capital proceedings. The
17 subsequent discovery of “new evidence” by defense counsel in post-conviction
18 proceedings is an enumerated ground warranting post-conviction relief, so long as such
19 newly discovered evidence “probably would have changed the verdict or sentence.”
20 Rule 32.1(e), Ariz. R. Crim. P. It simply cannot be said that the post-conviction
discovery of “new evidence” is more likely to occur where the post-conviction
investigation takes place before the direct appeal. The likelihood of such discovery
pales in comparison to a capital defendant’s Sixth Amendment guarantee of effective
assistance of counsel on direct appeal.

1 **Conclusion**

2 The proposed amendment would defeat a defendant's long-standing
3 constitutional right to raise an ineffective-assistance-of-appellate-counsel claim. In
4 addition, neither the claims of delay and fading memories justify making such a
5 significant procedural change. As a result, the State Bar opposes the proposed rule
6 change in its entirety.

7 **RESPECTFULLY SUBMITTED** this 15th day of April, 2014.

8 
9 John Furlong
10 General Counsel
STATE BAR OF ARIZONA
4201 North 24th Street
Phoenix, Arizona 85016-6288

11 Electronic copy filed with the
12 Clerk of the Supreme Court of Arizona
this 15th day of April, 2014.

13 by: 
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