

1 John Furlong, Bar No. 018356  
2 General Counsel  
3 State Bar of Arizona  
4 4201 N. 24th Street, Suite 100  
5 Phoenix, AZ 85016-6288  
6 (602) 340-7236  
7 [John.Furlong@staff.azbar.org](mailto:John.Furlong@staff.azbar.org)

8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**

10 In the Matter of:

11 **PETITION TO AMEND RULES**  
12 **32.2(a), 31.4(a), 31.13(f), 32.4, 32.6**  
13 **AND 32.9, ARIZONA RULES OF**  
14 **CRIMINAL PROCEDURE**

Supreme Court No. R-14-0010

**COMMENT OF**  
**THE STATE BAR OF ARIZONA**

15 The State Bar of Arizona hereby submits its comment in opposition to the  
16 Amended Petition to Amend Rules 31.2(a), 31.4(a), 31.13(f), 32.4, 32.6 and 32.9,  
17 Ariz. R. Crim. P.

18 **BACKGROUND OF ISSUE**

19 The Arizona Attorneys General (hereinafter "Petitioner") filed a petition to  
20 amend the aforementioned Rules of Criminal Procedure to delay the automatic direct  
21 appeal in death penalty cases until post-conviction review proceedings in state court  
22 have concluded.

23 The State Bar filed a comment opposing the petition, asserting its  
24 unconstitutionality given that all capital defendants were entitled to not only  
25 effective assistance of counsel during trial, but also effective assistance of counsel  
on direct appeal. Because Petitioner's proposed amendment provided for post-

1 conviction proceedings immediately following conviction and sentence of death, the  
2 proposed amendment operated to deny capital defendants their right to challenge the  
3 effective assistance of appellate counsel in post-conviction proceedings.

4 Petitioner then submitted an amended petition that responded to arguments  
5 submitted in opposition by the State Bar and the Federal Public Defender's Office  
6 but also re-urged its original position.

7 By order dated September 2, 2014, the Arizona Supreme Court directed this  
8 petition to "be reopened for additional comments providing general information,  
9 data, or studies regarding the administration of capital cases in states with a unitary  
10 review procedure similar to that proposed by the amended petition," and directed  
11 that comments be submitted no later than January 16, 2015.

### 12 **ISSUE**

13 Whether a procedure that obviates a capital defendant's right to challenge the  
14 effective assistance of appellate counsel in state court proceedings, and have such  
15 claim decided by Arizona state courts, violates a capital defendant's Sixth  
16 Amendment right and/or article 2, Sections 4, 11 and 24 of the Arizona Constitution.  
17

### 18 **DISCUSSION/ANALYSIS**

19 Arizona's current procedure afforded death penalty cases is:  
20 conviction/imposition of death sentence; automatic direct appeal (where claims of  
21 ineffective assistance of counsel cannot be raised); discretionary certiorari to the  
22 United States Supreme Court; post-conviction relief (where claims of ineffective  
23 assistance of counsel may be raised for the first time); federal habeas corpus  
24 proceedings.  
25

1           The statutory authority of federal courts to issue habeas corpus relief for  
2 persons in state custody is provided by 28 U.S.C. § 2254, as amended by the  
3 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Relief under the  
4 statute “shall not be granted with respect to any claim that was adjudicated on the  
5 merits in State court proceedings” unless such adjudication (1) resulted in a decision  
6 contrary to or involved an unreasonable application of established federal law or (2)  
7 resulted in a decision that was based on an unreasonable determination of the facts  
8 in light of the evidence presented in state court proceedings.

9           Thus, for reasons of federalism, 28 U.S.C. § 2254 requires federal courts to  
10 give the states an initial opportunity to correct alleged violations of its prisoners’  
11 federal rights. *Wilwording v. Swenson*, 404 U.S. 249, 92 S. Ct. 407 (1971). With  
12 respect to claims of ineffective assistance of counsel, “the pivotal question [on  
13 habeas] is whether the state court’s application of the Strickland standard was  
14 unreasonable. This is different from asking whether defense counsel’s performance  
15 fell below Strickland’s standards.” *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct.  
16 770, 785 (2011). As the United States Supreme Court observed, “[i]f this standard  
17 is difficult to meet, that is because it was meant to be. As amended by AEDPA,  
18 2254(d) stops short of imposing a complete bar on federal court relitigation of claims  
19 already rejected in state proceedings.” *Id.* at 786.

20           In *Harrington*, the Court made clear that federal habeas proceedings were not  
21 intended to take the place of state procedures aimed at ensuring the validity of  
22 convictions and correcting those which failed to pass constitutional muster —  
23 including but not limited to those resulting from the ineffective assistance of trial  
24 and/or appellate counsel. Indeed, it asserted: “Section 2254(d) reflects the view that  
25 habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice  
systems,’ not a substitute for ordinary error correction through appeal. *Jackson v.*

1 *Virginia*, 443 U.S. 307, 332, n. 5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).” *Ibid.*

2 As the Supreme Court further explained in *Harrington*:

3 ‘Federal habeas review of state convictions frustrates both the State’s  
4 sovereign power to punish offenders and their good-faith attempts to  
5 honor constitutional rights.’ *Calderon v. Thompson*, 523 U.S. 538, 555-  
6 556, 118 S. Ct. 1489, 140 L. Ed 728 (1998) (internal quotation marks  
7 omitted). It ‘disturbs the State’s significant interest in repose for  
8 concluded litigation, denies society the right to punish some admitted  
9 offenders, and intrudes on state sovereignty to a degree matched by few  
exercises of federal judicial authority.’ *Reed*, 489 U.S. at 282, 109 S.  
Ct. 1038 (Kennedy, J., dissenting).

10 Section 2254(d) is part of the basic structure of federal habeas  
11 jurisdiction, designed to confirm that the state courts are the principle  
12 forum for asserting constitutional challenges to state convictions.  
13 Under the exhaustion requirement, a habeas petitioner challenging a  
14 state conviction must first attempt to present his claim in state court. 28  
15 U.S.C. 2254(b). If the state court rejects the claim on procedural  
16 grounds, the claim is barred in federal court unless one of the exceptions  
17 to the doctrine of *Wainwright v. Sykes*, 433 U.S. 72, 82-84, 97 S. Ct.  
18 2497, 53 L. Ed 2d 594 (1977) applies. And if the state court denies the  
19 claim on the merits, the claim is barred in federal court unless one of  
the exceptions to 2254(d) set out in 2254(d)(1) and (2) applies. Section  
2254(d) thus compliments the exhaustion requirement and the doctrine  
of procedural bar to ensure that state proceedings are the central  
process, not just a preliminary step for a later federal habeas  
proceeding, see *id.*, at 90, 97 S. Ct. 2497.

20 *Harrington v. Richter*, *supra*, at 787.

21 The Sixth Amendment right to effective assistance of counsel applies equally  
22 to both trial and appellate counsel. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 69  
23 (1932 ) (trial counsel); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (appellate counsel).  
24 As the Ninth Circuit recognized in *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1294  
25 (9th Cir.2013), “[t]here is nothing in our jurisprudence to suggest that the Sixth

1 Amendment right to effective assistance of counsel is weaker or less important for  
2 appellate counsel than for trial counsel.”

3 As it stands, the Arizona Rules of Criminal Procedure permit capital  
4 defendants to raise claims of ineffective assistance of trial and appellate counsel for  
5 the first time in state post-conviction review proceedings. Petitioner’s effort to  
6 amend Arizona procedure to one that deprives a convicted capital defendant an  
7 opportunity to raise a claim of ineffective assistance of appellate counsel in state  
8 post-conviction proceedings in favor of permitting the claim to be raised for the first  
9 time on federal capital habeas ignores the “error correction” goals of state court  
10 review, rendering habeas proceedings “a substitute for ordinary error correction  
11 through appeal.” *Harrington, supra*. Such a procedure “frustrates the State’s  
12 sovereign power to . . . [exercise its] good-faith attempts to honor constitutional  
13 rights” and fails to “ensure that state proceedings are the central process.”  
14 *Harrington, supra*.

15 Where a viable claim of ineffective assistance of trial or appellate counsel  
16 exists but is not raised before the State courts in state court proceedings, federal  
17 courts may find cause to excuse a procedural default, “for if the attorney appointed  
18 by the State to pursue the direct appeal is ineffective, the prisoner has been denied  
19 fair process and the opportunity to comply with the State’s procedures and obtain an  
20 adjudication on the merits of his claims.” *Ha Van Nguyen, supra*, at 1295, *citing*  
21 *Martinez v. Ryan*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, \_\_\_  
22 U.S. \_\_\_, 133 S. Ct. 1911 (2013).

23 With this in mind, Petitioner acknowledges — as it must — that its proposal  
24 presents “no mechanism for raising appellate IAC claims in state court since such  
25 claims are raisable only in the first PCR proceeding, which [if the rules are modified]  
would occur before the direct appeal.” (Amended Pet., p. 7) Its proposed

1 modification of Arizona's existing procedure is thus designed to take advantage of  
2 Section 2254's expressed limitations by rendering the state's purposeful procedural  
3 denial of "fair process and the opportunity to . . . obtain an adjudication on the merits  
4 of his claims" by the state courts the very gateway to habeas review. (Amended  
5 Petition, p. 7, "Because under the proposed reform Arizona would not provide a  
6 mechanism or 'corrective process' for raising the appellate IAC claim in state court,  
7 such claims are entitled to de novo review in federal court.")

8       However, it is clear that no state conviction and death sentence should be  
9 upheld by the state courts without first providing the convicted a full and fair  
10 opportunity to have all constitutional claims presented to and decided by Arizona's  
11 highest court. *See Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's  
12 "duty to search for constitutional error with painstaking care is never more exacting  
13 than in a capital case"). Not only does Petitioner's effort ignore the United States  
14 Supreme Court's recognition that federal habeas jurisdiction is "designed to confirm  
15 that state courts are the *principle forum* for asserting constitutional challenges to  
16 state convictions," *Harrington, supra* (emphasis added), it defeats Arizona's long-  
17 recognized stance that the Rules of Criminal Procedure reflect "this Court's  
18 objective to afford greater procedural rights to a defendant facing the death penalty."  
19 *Sanchez v. Ainley*, 234 Ariz. 250, 254, 321 P.3d 415 (2014); *Cf. State v. Vickers*, 138  
20 Ariz. 450, 452, 675 P.2d 710 (1984) (observing that death penalty cases are treated  
21 differently than non-death penalty cases). Denying capital defendants the  
22 opportunity to raise claims of ineffective assistance of appellate counsel at the state  
23 court level — while permitting such claims to be raised in non-capital cases —  
24 accomplishes the exact opposite and frustrates the very purpose of capital habeas  
25 review. A state that creates a system that deprives convicted capital defendants of  
any avenue to raise a Sixth Amendment constitutional claim nullifies the very

1 constitutional right it is obligated to protect. Arizona should find no comfort in the  
2 purposeful creation of a less reliable state system of justice governing capital cases.

3         Petitioner acknowledges — as it must — that “[p]art of the current delay in  
4 the capital PCR is the willingness of qualified counsel to serve as counsel in a  
5 capital PCR” and adoption of its recommended procedure “does not address this  
6 aspect of capital PCR delay.” (Amended Petition, p. 8) However, it is the delay in  
7 appointment of qualified PCR counsel that is the main culprit in many of the cases.  
8 And while the original petition highlighted specific cases evidencing the time lapse  
9 between the conclusion of the direct appeal and the filing of the PCR (original  
10 petition, pp. 4-6) and the amended petition continued Petitioner’s arguments  
11 concerning the impact of delay upon the effectiveness and reliability of the process  
12 in general, neither petition identified the time lapse occurring between the  
13 appointment of PCR counsel and the filing of the PCR. The point is that no data  
14 supplied by Petitioner suggests that the identified delays in filing the PCR would  
15 have been decreased had the PCR preceded the direct appeal. There exists no logical  
16 or empirical data that suggests that altering Arizona’s post-conviction procedure to  
17 one in which the PCR precedes the direct appeal would shorten the state court post-  
18 conviction process — it would only serve to deny capital defendants the opportunity  
19 to raise Sixth Amendment IAC claims against appellate counsel at the state court  
20 level. Moreover, it is clear that should a capital defendant be forced to wait until  
21 federal habeas proceedings to raise an appellate counsel IAC claim for the first time,  
22 if successful, that delay gives rise to the very dangers of “fading memories” and “lost  
23 files” on which Petitioner professes to rely in bringing the rule modification petition  
24 in the first instance. The state’s goal of moving a capital case from the state system  
25 to the federal system more quickly may not be satisfied by simply shifting the burden  
of delay to capital defendants by prohibiting presentation of Sixth Amendment

1 challenges to the state courts. The notion of “justice delayed is justice denied”  
2 applies with equal force to both capital defendants and the state.

3 With good reason, each of the remaining 31 states authorizing the death  
4 penalty have statutes and/or rules providing convicted defendants with the  
5 opportunity to challenge the effective assistance of counsel (trial and appellate) in  
6 state court post-conviction proceedings. Arizona must not, and indeed cannot,  
7 constitutionally remove the right to challenge the effectiveness of appellate counsel  
8 appointed by the state in capital cases by simply deleting the procedural rules  
9 allowing such challenge to be made at the state court level. Doing so exclusively in  
10 capital cases gives rise to the untoward result of affording non-capital defendants  
11 greater rights than capital defendants, runs afoul of the goals of federal habeas, and  
12 violates the rights afforded to all criminal defendants by the federal and state  
13 constitution.

14 The Arizona Constitution Article 2, section 4 (guaranteeing due process of  
15 law), section 11 (guaranteeing justice without unnecessary delay) and section 24  
16 (guaranteeing inter alia “the right to appeal in all cases”) provides all convicted  
17 defendants with the right to challenge the effectiveness of appellate counsel and to  
18 have such claim ruled on by Arizona’s highest court. In addition to preserving the  
19 systemic goals of federal habeas, these state constitutional guarantees, firmly  
20 established, prevent the state from crafting a procedure specifically designed to  
21 preclude Sixth Amendment challenges concerning the effectiveness of the appellate  
22 lawyer it appointed to protect the constitutional rights of capital defendants, and  
23 consequently avoid adjudication of those claims by Arizona’s highest court — all in  
24 the name of procedural expediency.  
25

1 **CONCLUSION**

2 For the reasons stated, the State Bar opposes the rule modifications proposed  
3 by Petitioner.

4  
5 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of January, 2015.

6  
7  
8   
9 \_\_\_\_\_  
10 John Furlong  
11 General Counsel

12 Electronic copy filed with the  
13 Clerk of the Arizona Supreme Court  
14 this 9<sup>th</sup> day of January, 2015.

15 by:   
16 \_\_\_\_\_  
17  
18  
19  
20  
21  
22  
23  
24  
25