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In the Matter of: Petition to Amend Rules 31.2, 31.4, 31.13, and 32.9 of Arizona Rules of Criminal Procedure	No. R-14-0010 **COMMENT OF THE MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE OPPOSING PETITION TO AMEND RULES 31.2, 31.4, 31.13, AND 32.9 OF ARIZONA RULES OF CRIMINAL PROCEDURE**

The Maricopa County Public Defender's Office ("MCPD") opposes the Petition to Amend Rules 31.2, 31.4, 31.13, and 32.9 of Arizona Rules of Criminal Procedure. MCPD is the largest indigent defense law firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 36,000 criminal cases.

MCPD opposes the proposed amendments because the resulting scheme would: (1) insert confusion and tension into a post-conviction review scheme that already works soundly, (2) drastically increase the resource burden in capital cases,

and (3) violate a defendant's right to obtain review of the adequacy of representation by appellate counsel. MCPD also agrees with the comments previously submitted by the Arizona State Bar on April 15, 2014, and January 9, 2015; the joint comment by Arizona Attorneys for Criminal Justice, Maricopa County Legal Defender, and Federal Public Defender on June 13, 2014; and the comment submitted by the Federal Public Defender on April 15, 2014.

DISCUSSION

The Maricopa County Public Defender's Offices opposes the Petition to Amend Rules 31.2(a), 31.4(a), 31.13(f), 32.4, 32.6 and 32.9, Ariz. R. Crim. P. The Petitioner filed an Amended Petition on May 20, 2014. The Petition creates a number of problems that have been addressed in previous filings, including the filings by the Federal Capital Habeas Unit and the Arizona State Bar. This comment will focus on three overarching issues: the conflict which will arise between appellate and post-conviction relief counsel, the inefficiency of the proposed scheme, and the impact on a defendant's ability to raise ineffective assistance of appellate counsel claims.

I. The proposed scheme will create tension between post-conviction and appellate attorneys.

Under the present scheme, direct appeal helps narrow and define how issues should be raised in PCR proceedings. The proposed scheme, however, would insert unnecessary tension between PCR and appellate counsel regarding how

claims should be raised or argued. The comment submitted by the Federal Public Defender, Arizona Attorneys for Criminal Justice, and Maricopa County Legal Defender on June 13, 2014, included a letter from Bert Nieslanik, Deputy Director of Alternate Defense Counsel in Colorado. Mr. Neislanik pointed out that there may be times when a conflict arises between PCR counsel and appellate counsel over preservation. In its most basic incarnation, disputes would arise regarding whether issues were appropriately preserved for appellate review. Appellate attorneys would want to argue that issues were appropriately preserved during trial (to avoid a fundamental error review) whereas PCR attorneys would want to argue an attorney failed to appropriately preserve issues (in order to effectively make an IAC claim). Such a structure harms defendants in two manners.

First, PCR counsel's argument presupposes a court ruling. Under the current system, if appellate counsel wants to argue an issue was appropriately preserved, an appellate court would enter a ruling regarding preservation. If the appellate court finds the issue was appropriately preserved, the appellate court will address the issue on the merits. If the appellate court finds the issue was not preserved, PCR counsel then has an opportunity to claim the trial attorney was ineffective for failing to raise the claim. In this setting, the current system ensures the claim will be addressed at the appropriate time, in the appropriate venue, and by the appropriate standard of review.

Second, under the current system any decision of appellate counsel can be taken into consideration. If an appellate attorney fails to raise an issue that was appropriately preserved, the failure can be addressed during PCR. If the appellate attorney concludes that an issue was not appropriately preserved, the decision can guide PCR. PCR counsel can challenge the appellate attorney's decision or the trial counsel's failure.

The system proposed by the Petitioner, however, would create a tension over how arguments should be framed. PCR claims would inevitably address arguments better suited for direct appeal. Defendants would inevitably be unable to adequately claim appellate counsel erred. The current system avoids this tension. A preceding direct appeal narrows, clarifies, and directs the issues to be raised on PCR.

The tension between PCR and appellate counsel exists beyond just issues of preservation. The proposed rule does not clarify which attorney is responsible for the coordination of record reconstruction. The proposed rule does not explain what should be done when appellate counsel observes ineffective assistance of previous counsel. The ABA Guidelines require appellate attorneys "should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules." ABA Guidelines for the

Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1(C). The commentary emphasizes, "it is of critical importance that counsel on direct appeal proceed … in a manner that maximizes the client's ultimate chances of success." *Id.* commentary. To this extent, the commentary indicates that appellate counsel should not narrow or winnow issues in a capital appeal, as such conduct "can have fatal consequences." *Id.* "When a client will be killed if the case is lost, counsel should not let any possible ground for relief go unexplored or unexploited." *Id.*

Under the present scheme, the process makes sense. If appellate counsel sees ineffective assistance of trial counsel, appellate counsel knows that if relief is not granted, defendant's rights are still protected by the following PCR stage. If the PCR stage precedes the Direct Appeal, any observation does not have the present guarantees. If an appellate attorney observes ineffective assistance of PCR counsel, or unpreserved or undeveloped claims of ineffective assistance of trial counsel, the appellate attorney would ethically be forced to raise the claim during the appeal.

The proposed scheme also fails to clarify responsibilities after the PCR proceeding. While the proposed amendments set forth the deadline for a Petition for Review from the PCR, the proposed amendments do not clarify who is responsible for such a filing. The Petition suggests PCR counsel files the Petition

for Review. Amended Petition, 1. The proposed amendments, however, do not make this clear. Rather, the proposed amendments merely discuss the time for filing the Petition for Review and indicate the Petition for Review is consolidated with the Direct Appeal. Proposed amendments to Rules 31.13(f)(1) (time for filing); 32.9(c) (consolidation). The proposed amendments provide no insight as to how consolidation must be accomplished. The proposed amendments provide for a 4,000 word increase to the Opening Brief to accommodate inclusion of issues presented in the PCR. Proposed amendment to Rule 31.13(f)(2). The rule provides no indication if this is meant to be a cut-and-paste of the Petition for Review or an actual development of the arguments presented in the Petition for Review. If the Opening Brief is intended to develop the arguments, an additional 4,000 words is woefully inadequate to include the functional equivalent of a second investigation. If the intent is to merely cut-and-paste the Petition for Review, no mechanism is provided within the rules to supplement. No guidance is given as to who is responsible for oral arguments. If the rule intends for appellate counsel to take over, appellate counsel may be forced to adopt and advance contrary positions or arguments that appellate counsel believes are improper. If oral argument is to be split between PCR and appellate counsel, further tension may exist regarding the best strategy to obtain relief. The current scheme has none of these infirmities.

II. The proposed scheme inefficiently uses financial and human resources.

By placing the PCR proceedings ahead of direct appeal, the Petitioner presupposes that PCR will be necessary. If the Arizona Supreme Court or United States Supreme Court reverses a sentence or conviction on direct appeal, a PCR is unnecessary. Under the current system, a PCR is conducted only when a direct appeal did not result in a remedy. Because the proposed scheme requires a PCR precede the Direct Appeal, the proposed scheme ignores the very real possibility of appellate relief. The impact of this presumption, though, is costly.

While the duty to continue investigation exists at every stage of the capital case process, including appeal,[1] appellate investigation is inherently minimal. Appellate review is limited to the Record on Appeal. *Lawless v. St. Paul Fire Marine Ins. Co.*, 100 Ariz. 392, 398, 415 P.2d 97, 101 (1966) (holding this Court could not determine alleged error where no transcript); *State v. Linden*, 136 Ariz. 129, 134, 664 P.2d 673, 678 (App. 1983). To this extent, during direct appeal the focus is on arguments supported by the record. While some investigation may occur, it has been the experience of appellate attorneys in the MCPD that any ongoing investigation is minimal.

[1] ABA Guidelines for the Appointment and performance of Defense Counsel in Death Penalty Cases, Guideline 10.7(A) ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.").

As a counterpoint, PCR investigations involve beginning the investigation anew. As the ABA Guidelines point out:

> Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments—those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal—are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system….
>
> For similar reasons, collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7. (Subsection E(4)).

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.15.1 Commentary. The ABA Guidelines require PCR counsel to reinvestigate both the crime and the background of the client. *Id.* Investigation into the background of the client is often the most extensive and costly part of the process.

The structure of MCPD's Capital and Appeals units reflects this difference. The Appeals unit has no permanently assigned investigator, paralegal, or mitigation specialist. While any such professional could be obtained, no permanent assignment is necessary because such requests are so infrequent. On the other hand, Capital PCR's are appointed to the Capital Trial Group. Each case is appointed an investigator, mitigation specialist, and paralegal. Because investigation begins anew in Capital PCR cases, each of these professionals is necessary at the PCR stage.

The financial impact of this difference is not insubstantial. MCPD currently has two Capital PCR cases at differing stages. At this point, one case has incurred over $70,000 is non-attorney staff salaries (paralegals, investigators, mitigation specialists) and over $40,000 in expenses. This is the case that is not as far along in the process. The second case (which is further along in the PCR process) has cost over $95,000 in non-attorney staff salaries, and over $75,000 in legal expenses. These calculations set aside attorney salaries. If attorney salaries were included, the cost drastically increases (over $180,000 in the first case and over $300,000 in the second case).

While appellate relief does not occur in every case, it occurs with sufficient regularity to justify maintaining the present review scheme. Reviewing this Court's Capital cases decided since *Ring v. Arizona*, 536 U.S. 584 (2002), but not including *Ring* remands, this Court has granted relief in at least six cases, including:

- *State v. Ketchner*, CR-13-0158-AP, 2014 WL 7180242 (2014) (reversing first-degree murder conviction and remanding for new trial)
- *State v. Grell*, 231 Ariz. 153, 291 P.3d 350 (2013) (death sentence vacated, life sentence imposed).
- *State v. Wallace*, 229 Ariz. 155, 272 P.3d 1046 (2012) (death sentence vacated, two life sentences imposed).

- *State v. Snelling*, 225 Ariz. 182, 236 P.3d 409 (2010) (death sentence vacated, life sentence imposed).
- *State v. Lynch*, 225 Ariz. 27, 234 P.3d 595 (2010) (death sentence vacated, remanded for resentencing).
- *State v. Gunches*, 225 Ariz. 22, 234 P.3d 590 (2010) (death sentence vacated, remanded for resentencing).
- *State v. Wallace*, 219 Ariz. 1, 191 P.3d 164 (2008) (two death sentences vacated and remanded for resentencing, one sentence reduced to life).
- *State v. Anthony*, 218 Ariz. 439, 189 P.3d 366 (2008) (convictions reversed and remanded for new trial).

Under the proposed scheme, a PCR would have occurred in each of these cases before appeal. This Court then would have vacated the death sentence and the process would have started again. *State v. Wallace* provides even more reason to avoid the new proposal. Just utilizing the two opinions referenced above, the proposed amendment would have seen the process proceed as follows:

- Trial investigation
- PCR investigation beginning anew
- Appeal obtaining relief
- Trial investigation (beginning anew or continuing on PCR)
- PCR investigation (again beginning anew)

- Appeal obtaining relief

Under the current scheme, neither PCR investigation would have occurred. To the extent that any PCR investigation may follow, the financial burden is reduced by the cost of at least one PCR investigation. Additionally, the judicial resources required throughout the PCR process are avoided.

That a defendant may obtain relief during Capital PCR does not alter the cost-benefit analysis. The current system places the less expensive method of review first; the proposed change places the more expensive method of review first. Under the current system, a grant of relief during the Direct Appeal avoids the substantial cost of a PCR investigation. Under the proposed system, a grant of relief during the PCR avoids only the minimal cost of a Direct Appeal.

Finally, the proposed scheme would unnecessarily insert an additional agency or representative into every capital case. Under the current scheme, capital cases tried by the MCPD can ethically be handled by the MCPD Appeals unit. However, if a PCR precedes the direct appeal, MCPD could no longer handle appeals in cases tried by the MCPD. The appeal would necessarily deal with allegations of ineffectiveness raised during the PCR, creating a conflict for MCPD. This would be the case in any indigent defense agency that handles its own appeals. To that extent, the new scheme makes any possible vertical representation completely impossible.

III. The proposed scheme undermines a defendant's sixth amendment right to effective assistance of appellate counsel and hinders a defendant's ability to raise claims regarding the ineffective assistance of appellate counsel.

The comment previously submitted by the State Bar noted that the amendments proposed by Petitioner would deprive capital defendants of an opportunity to raise ineffective assistance of appellate counsel claims. The concern addressed in the State Bar's comment was that capital defendants would not be able to raise ineffective assistance of appellate counsel in federal habeas proceedings because the claim was not exhausted in State courts. The Petitioner admits in the Amended Petition, "It is true that under the proposed reform there is no mechanism for raising appellate IAC claims in state court since such claims are raisable only in the first PCR proceeding, which would occur before the direct appeal." Amended Petition, 7. Petitioner argues that 28 U.S.C. § 2254(b)(1)(B) resolves this issue. Because there is no state mechanism allowing a defendant to raise ineffective assistance of appellate counsel, defendants would be able to raise the claim for the first time during habeas proceedings.

As an initial point, MCPD disagrees with Petitioner's interpretation. After research, MCPD was not able to find any case supporting the Petitioner's interpretation of 28 U.S.C. § 2254. The Petitioner relied upon *Medley v. Runnels*, 506 F.3d 857 (9th Cir. 2007) to support its claim that defendants would be able to raise such arguments for the first time in habeas proceedings. *Medley* does not

support this proposition. The majority in *Medley* considered the claim precisely because the defendant had raised the issue in a state court. *Medley*, 506 F.3d at 863. The Petitioner also cited *Felkner v. Jackson*, 562 U.S. __, 131 S. Ct. 1305, 1307 (2011) for the proposition, "Thus, because the Arizona capital prisoner falls within an exception to the federal exhaustion requirement, the prisoner may raise appellate IAC claims in federal court and is able to avoid the extremely high deference required by 28 U.S.C. § 2254(d) for state-court merit decisions on federal habeas review." Amended Petition, 8. *Felkner* discusses the deference given to state courts but does not provide any support for the remainder of the assertion.

The Petitioner's attempt to create such a legal loophole is also inconsistent with policy considerations underlying the exhaustion doctrine. The United States Supreme Court has ruled, "as a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act." *Rose v. Lundy*, 455 U.S. 509, 515 (1982). The Ninth Circuit expressly adopted this approach, noting, "A contrary rule would deprive state courts of the opportunity to address a colorable federal claim in the first instance and grant relief if they believe it is warranted." *Cassett v. Sewart*, 406 F.3d 614, 624 (9th Cir. 2005). In light of this policy, the Ninth Circuit encouraged the

district court to stay the defendant's habeas petition to allow the defendant to exhaust his claim in Arizona state courts. *Id.* at 625.

In light of the strong policy in favor of allowing state courts the opportunity to decide issues first, the likely result will be very different from what the Petitioner suggests. When the habeas petition alleges ineffective assistance of appellate counsel, it is likely district courts will send the cases back to Arizona so defendants have an opportunity to exhaust the claims in state courts. This merely muddles the process, creates an unnecessary break in the process, and confuses the issues. The end result will inevitably be two post-conviction relief proceedings: a first occurring before appeal, and a second occurring while a habeas petition is stayed in district court.

Even if the Petitioner is correct, the process should still not be endorsed because the proposal ignores the impact on capital defendants' ability to base arguments on State grounds. Federal habeas can only be claimed in limited circumstances. A federal court can entertain a federal habeas petition "only on the ground that [a defendant] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "In providing for habeas relief, Congress intended to limit the issuance of the writ of habeas corpus to violations of federally protected rights, and therefore state law must govern the issue of remedy for violations of state law." *U.S. ex rel. Hoover v. Franzen*, 669 F.2d 433, 437 (7th

Cir. 1982). Moreover, where decisions have been rendered, federal courts may only grant habeas writs when the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). By proposing to forego State proceedings, the Petitioner attempts to limit any claims regarding ineffective assistance of appellate counsel to only federal issues which have been clearly established. Capital defendants would be unable to argue an appellate counsel was ineffective based upon Arizona laws, cases, or constitutional provisions. Capital defendants would also be unable to argue an appellate attorney was ineffective based on issues which are well-settled in Arizona, but less settled in federal courts.

The Arizona State Bar submitted a comment on January 9, 2015, explaining how the proposed scheme improperly limited a defendant's ability to raise ineffective assistance of appellate counsel claims. MCPD agrees with the State Bar's position.

IV. The Petitioner has failed to adequately address previous criticisms.

Many of the issues discussed above were inadequately addressed by the Amended Petition. Beyond the issues discussed above, the Amended Petition has also fails to address criticisms previously raised by the State Bar of Arizona.

A. Delay Borne From Appointment of Post-Conviction Counsel.

In the comment submitted on April 15, 2014, the Arizona State Bar noted that the Petition failed to adequately address the actual reason for delay. State Bar Comment, 3-4 (April 15, 2014). While the Petition to Amend indicates the goal is to decrease delays, delays are caused by a shortage of qualified and willing counsel. The Amended Petition admits this is part of the problem and concedes this problem is not fixed by the Petition. Amended Petition, 8. There is no reason to believe that moving Rule 32 proceedings earlier will decrease delays when such a move fails to address the heart of the problem.

To the contrary, it would seem the inevitable result would be greater delays. Under the current process, when the Arizona Supreme Court reverses or vacates a conviction or sentence, no Rule 32 proceeding is necessary. Thus, less qualified and willing PCR attorneys are required under the current system than would be required under the proposed system.

B. Fading Memories And Lost, Destroyed or Misplaced Evidence.

The State Bar also pointed out in its original comment that multiple procedural guarantees exist to ensure records are appropriately collected and preserved. State Bar Comment, 4-5 (April 15, 2014). The Petitioner's response to this is largely off point. Amended Petition, 8-9. The Petitioner asserts attorneys do not comply with the rules addressed by the State Bar and that files are not

completely disclosed. There is no stated support for this proposition and there is no claim regarding the significance of the claim. Without reason to believe that the alleged problem is inherent or substantial, there is no reason to initiate a change. MCPD agrees that the procedural rules currently in place adequately protect the concerns regarding lost, destroyed, or misplaced evidence.

CONCLUSION

For the reasons stated above, MCPD opposes the Petition to Amend Rules 31.2(a), 31.4(a), 31.13(f), 32.4, 32.6 and 32.9, Ariz. R. Crim. P.

RESPECTFULLY SUBMITTED this 16th day of January, 2015.

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