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10 (STATE BAR NUMBERS 003813 AND 014119)

11 IN THE SUPREME COURT OF THE STATE OF ARIZONA

12 IN THE MATTER OF:

R-08-0010

13 PETITION TO AMEND THE RULES 32.4(c)
14 AND 32.6(a) AND (b) OF THE ARIZONA
15 RULES OF CRIMINAL PROCEDURE

MARICOPA COUNTY ATTORNEY'S
COMMENTS TO PETITION TO AMEND
RULES 32.4(C)(2) AND 32.6(A) AND 32.6 (B)
OF THE ARIZONA RULES OF CRIMINAL
PROCEDURE

16 The Maricopa County Attorney hereby comments to, and opposes, the Petition to Amend Rules
17 32.4(c) and 32.6(a) and (b) of the Arizona Rules of Criminal Procedure.

18 Respectfully submitted this 19th day of May, 2008.

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21
22 BY: 
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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3 **I. Introduction**

4 The Pima County Public Defender ("PCPD") proposes to expand the time for filing a petition for

5 post-conviction relief from 60 to 90 days, and also to eliminate the current requirement for a showing of

6 extraordinary circumstances for any extensions beyond an initial 30-day extension. The PCPD

7 additionally proposes to increase the time within which the State must file a response to a petition for

8 post-conviction relief from 45 days to 90 days, as well as eliminate the current requirement for a

9 showing of extraordinary circumstances for any extensions beyond an initial 30-day extension. The

10 proposal also seeks to eliminate the requirement for a showing of extraordinary circumstances for any

11 extension of time for the current allowance of 15 days within which a defendant may file a reply. These

12 proposals are unnecessary, and will serve only to add further delay and further undermine finality in

13 criminal proceedings. *See State v. Ward*, 211 Ariz. 158, ¶ 8, 188 P.3d 1122 (App. 2005) (post

14 conviction relief is primarily a gratuitous form of collateral relief).

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17 **II. The Purpose and Limited Scope of Rule 32**

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19 Rule 32 is a post-conviction remedy "designed to accommodate the unusual situation where

20 justice ran its course and yet went awry." *State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995

21 (1984). The post-conviction rules do not contemplate a second appeal, and a defendant may not employ

22 the rule to unnecessarily delay the rendition of justice or add a third day in court when fewer days will

23 provide substantial justice. *Id.* at 145, 692 P.2d at 994. Further, there is no constitutional right to a

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1 petition for post-conviction relief. *Id.*¹

2 The scope of post-conviction proceedings is strictly limited to the specific grounds for relief
3 enumerated in Rule 32.1. *Carriger*, 143 Ariz. at 146, 692 P.2d at 995. (“It is the petitioner’s burden to
4 assert grounds that bring him within the provisions of the Rule in order to obtain relief.”) In sum, Rule
5 32 “allows a defendant to raise issues unknown or unavailable at trial” which, if proven, would
6 demonstrate that “the conviction or sentence was obtained in disregard of fundamental fairness, which is
7 essential to our concept of justice.” *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). *See*
8 *also State v. Krum*, 182 Ariz. 288, 292, 903 P.2d 596, 600 (1995) (“post-conviction proceedings
9 generally provide a remedy only for constitutional errors involving the defendant’s trial or direct appeal
10 of right”) (emphasis in original).

11 The PCPD contends that the requested additional time is necessary “because the defense attorney
12 frequently has to conduct an independent investigation to locate witnesses and physical evidence and to
13 consult with experts and obtain expert opinions. This is especially likely to occur in cases involving
14 newly discovered evidence or ineffective assistance of counsel.” (Petition to Amend, at 2, citations
15 omitted.)

16 The flaw in this argument is that Rule 32.4(a) provides that a notice of petition for post-
17 conviction relief alleging newly discovered evidence may be filed at any time. *See also State v. Pruett*,
18 185 Ariz. 128, 131-32, 912 P.2d 1357, 1360-61 (App. 1995). Indeed, the proposal relies on two cases
19 that illustrate this point. In *State v. Bilke*, 162 Ariz. 51, 781 P.2d 28 (1989), a defendant filed an
20 amended petition for post-conviction relief pursuant to Rule 32.1(e) alleging that a mental illness
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22 ¹ In Arizona, a person who pleads guilty does not have a right to a direct appeal. A.R.S. § 13-4033(B). Instead, the person
23 “shall have the right to file a post-conviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right
24 proceeding.” Rule 32.1, Ariz. R. Crim. P. *See also, State v. Hasson*, 217 Ariz. 559, n.2., 177 P.3d 301 (App. 2008). In such
25 cases, Arizona courts have held that a Rule 32 proceeding is the functional equivalent of a direct appeal. *See Ward*, 211
26 Ariz. 158, at ¶¶ 7-9. *But see State v. Smith*, 184 Ariz. 456, 460, 910 P.2d 1, 5 (Martone, J, concurring) (“the right to appeal,
27 as guaranteed by the constitution, can be waived, and [the Arizona Supreme Court] has needlessly constitutionalized Rule 32
28 proceedings”).

1 existent at the time of his sentencing, but recently diagnosed, was newly discovered evidence that might
2 have changed his sentence—which the Arizona Supreme Court held was sufficiently colorable to
3 warrant an evidentiary hearing. The PCPD’s proposed amendments to the rule would not have
4 enhanced, or even changed, Bilke’s ability to seek and obtain relief because, as the case illustrates, the
5 existing rule already provides an adequate avenue.
6

7 Similarly, in *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990), the defendant presented a
8 colorable claim under Rule 32.1(e) that his post-sentence diagnosis of an infection with the HIV virus
9 may have affected his sentence, entitling him to an evidentiary hearing to determine, among other
10 things, if the condition existed at the time of his sentencing. Again, the existing rule provided the means
11 for presentation of newly discovered evidence that may have affected the sentence or conviction.
12 Therefore, the PCPD’s request for additional time for “investigation” of newly-discovered evidence is
13 unwarranted and unnecessary.
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15 The assertion that additional time is necessary to “investigate” claims of ineffective assistance of
16 counsel is also specious. The PCPD implies that complete re-investigation and re-trial of a case is
17 required in order to determine whether previous defense counsel was ineffective. This is not
18 contemplated by the limited scope of Rule 32, nor is it required under the standard for ineffective
19 assistance of counsel under the Sixth Amendment articulated by the United States Supreme Court in
20 *Strickland v. Washington*, 466 U.S. 668 (1984).
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22 In *Strickland v. Washington*, the Court addressed, for the first time, the claim of “actual
23 ineffectiveness” of counsel’s assistance in a case going to trial. 466 U.S. at 683. The Court explained
24 that in cases presenting claims of “actual ineffectiveness,” the Court is guided by the purpose of the
25 Sixth Amendment, which is to ensure a fair trial. *Id.* at 686. “The benchmark for judging any claim of
26 ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the
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1 adversarial process that the trial court cannot be relied on as having produced a just result.” *Id.* This
2 definition of the constitution’s requirement forms the background to the now-familiar two-prong test for
3 ineffectiveness:

4 First, the defendant must show that counsel’s performance was deficient. This requires
5 a showing that counsel made errors so serious that counsel was not functioning as the
6 “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant
7 must show that the deficient performance prejudiced the defense. This requires showing
8 that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial
whose result is unreliable.

9 *Id.* at 687 (quotes in the original). The Court went on to state that, when asserting ineffectiveness, a
10 defendant “must show that counsel’s representation fell below an objective standard of reasonableness.”

11 *Id.* at 687-88.

12 Complete re-investigation of a case typically reveals only that another lawyer may have conducted
13 the case differently, not that counsel’s representation fell below an objective standard of reasonableness.
14 Indeed, it would be difficult to find two lawyers that would ever conduct the same case in the same way.
15 Rule 32 is not intended to afford such comprehensive investigation along with the accompanying delay.
16 See *Carriger*, 143 Ariz. at 145, 692 P.2d at 994 (a defendant may not employ rule to unnecessarily
17 delay the rendition of justice or add a third day in court when fewer days will provide substantial
18 justice).
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20 The PCPD concedes that the alleged problems with defense counsel needing additional time
21 within which to file a petition for post-conviction relief are more likely to occur in PCR proceedings
22 from cases that proceed to trial, in which case there has already been a direct appeal, making the Rule 32
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1 proceeding a collateral review.² (Petition to Amend, at 3.) In such cases, the PCPD alleges that
2 “voluminous” trial records may pose a time challenge for defense counsel. However, the current rule
3 allows for one 30-day extension of time for “good cause”, and additional 30-day extensions if
4 “extraordinary circumstances” are shown. This procedure provides adequate relief in the event of a
5 complex case. The PCPD’s premise that trial courts cannot to be trusted with these standards is
6 unfounded. Moreover, removing the responsibility of defense counsel to file timely Rule 32 petitions,
7 and the need for both parties to justify extensions when necessary, provides no assurance for finality and
8 the prompt resolution of criminal cases.
9

10 III. Victim’s Rights

11 The Victim’s Bill of Rights provides victims the right to a “prompt and final conclusion of the
12 case after the conviction and sentence.” Ariz. Const. Art. II, § 2.1(10); Ariz. R. Crim. P., Rule
13 39(b)(15). The Arizona Supreme Court has further clarified this important right:
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15 We are obligated by the Arizona Constitution to attempt to protect the rights of the
16 victims of crime, which includes the right “[t]o a speedy trial or disposition and prompt
17 and final conclusion of the case after the conviction and sentence.” This case has,
18 regrettably, already been in the courts far too long. If we were to accept defendant’s
19 present arguments, this case, and others like it, would go on indefinitely.

20 * * *

21 Without finality, the criminal law is deprived of much of its deterrent effect. The fact
22 that life and liberty are at stake in criminal prosecutions shows only that conventional
23 notions of finality should not have *as much* place in criminal as in civil litigation, not
24 that they should have *none*.

25 *State v. Mata*, 185 Ariz. 319, 337, 916 P.2d 1035, 1053 (1996) (quoting *Teague v. Lane*, 489 U.S. 288,
26 309, 109 S. Ct. 1060, 1074-75 (1989) (emphasis in original). See also *State v. Hickman*, 205 Ariz. 192,

27 ² The PCPD admits that of-right petitions for post-conviction relief from plea agreements are generally very “simple.”
28 (Petition to Amend, at 3.) As with other Rule 32 petitions, defense counsel in the rare complex Rule 32 proceeding from a
plea agreement has the ability to increase the time within which to file a petition by showing “good cause” and, if needed,
“extraordinary circumstances,” at the trial court’s discretion. See Rule 32.4(c)(2).

¶ 33, 68 P.3d 418 (2003) (holding that “[c]learly, the automatic reversal rule of *Huerta* thwarts a victim’s constitutional and statutory right to a speedy resolution and finality”); *State v. Tower*, 204 Ariz. 386, ¶ 14, 64 P.3d 828 (2003) (“Arizona courts are especially concerned with the finality of criminal cases because the Arizona Constitution requires courts to protect the rights of victims of crime by ensuring a ‘prompt and final conclusion of the case after the conviction and sentence.’”). The PCPD’s proposed amendments to Rules 32.4(c) and 32.6(a) and (b) thwart this important constitutional right by adding unjustified delay while advancing no specific corresponding federal constitutional trial right for a criminal defendant.³

CONCLUSION

For the reasons set forth above, MCAO opposes the Petition to Amend Rule 32.4(c) and Rule 32.6(a) and (b) of the Arizona Rules of Criminal Procedure. The Petition should be denied as unnecessary, and, further, because the proposed changes are inconsistent with the Arizona Constitution by unjustifiably delaying a victim’s right to a prompt and final conclusion after conviction and sentence.

Respectfully submitted this 19th of May, 2008.

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³ It is well-accepted that “if, in a given case, the victim’s state constitutional rights conflict with a defendant’s federal constitutional rights to due process and effective cross-examination, the victim’s rights must yield.” *Gould*, 212 Ariz. 541, at ¶18, quoting *State v. Riggs*, 189 Ariz. 327, 330, 942 P.2d 1159, 1162 (1997); *State ex rel. Thomas v. Foreman*, 211 Ariz. 253, ¶ 16, n.12, 118 P.3d 1117 (App. 2005) (Although crime victim’s representative has a right to refuse to cooperate with the defense before trial, the right is not absolute; the representative cannot refuse to testify, or to provide exculpatory information that is essential to a defense or to effective cross-examination of a trial witness.).

1 Copies of the forgoing mailed
2 this 19th day of May, 2008 to:

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