ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY
(FIRM STATE BAR NO. 0003200)

PHILIP J. MACDONNELL
CHIEF DEPUTY COUNTY ATTORNEY
JAMES P. BEENE
DEPUTY COUNTY ATTORNEY
301 WEST JEFFERSON STREET, SUITE 800
PHOENIX, ARIZONA 85003
TELEPHONE: (602) 506-3800
(STATE BAR NUMBERS 003813 AND 014119)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: PETITION TO AMEND RULE 8.2(a)(4) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE.	R-07-0005 MARICOPA COUNTY ATTORNEY'S COMMENTS TO PETITION TO AMEND RULE 8.2(a)(4) OF THE ARIZONA RULES OF CRIMINAL PROCEDURE

The Maricopa County Attorney hereby comments to, and opposes, the Petition to Amend Rule 8.2(a)(4) of the Arizona Rules of Criminal Procedure.

Respectfully submitted this 19th day of May, 2008.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

BY: Philip J. MacDonnell
PHILIP J. MACDONNELL
CHIEF DEPUTY

JAMES BEENE
DEPUTY COUNTY ATTORNEY

Attorney Treasure VanDreumel proposes to amend Rule 8.2(a)(4) of the Arizona Rules of Procedure by expanding the time within which a capital case must commence trial from the current 18 months from arraignment to 30 months from the filing of the State's notice of intent to seek the death penalty. For the following reasons, this Court should reject Ms. VanDreumel's proposed amendment.

Rule 6.8 Does Not "Incorporate" the ABA Guidelines

Ms. VanDruemel contends that the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases are "incorporated" into Rule 6.8 of the Arizona Rules of Criminal Procedure, and argues that the standard for measurement of effective assistance of counsel has radically changed and become strict liability to conformity with the ABA's lengthy guidelines. This contention is without support. The standard for ineffective assistance of counsel under the Sixth Amendment remains that which is articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), not the ABA Guidelines.

Rule 6.8(b)(iii) requires lead trial counsel in a capital case to "be familiar with *and guided by* the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases[.]" (Emphasis added.) The italicized words "and guided by" are the "incorporation" Ms. VanDreumel refers to which were added to the rule in September 2006, becoming effective on January 1, 2007. However, Ms. VanDreumel neglects to include the 2006 Comment to this addition, which reads as follows:

> The America Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) is a compendium of best practices for representation in capital cases. Some guidelines may not be applicable to Arizona practice or to the circumstances of a particular case, but in exercising independent judgment, counsel should be guided by the performance standards when applicable.
>
> *A deviation from the guidelines, however, is not per se ineffective assistance of counsel. The standard for evaluating counsel's performance continues to be that set forth in Strickland v. Washington, 466 U.S. 688 (1984).*

(Emphasis added.) The *Strickland* standard has thus remained the standard in Arizona and also in United States Supreme Court case law, despite efforts by defense attorneys to "incorporate" the ABA Guidelines as strict liability rules.

In *Strickland v. Washington*, the Court addressed for the first time the claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. 466 U.S. at 683. The Court explained that in cases presenting claims of "actual ineffectiveness," the Court is guided by the purpose of the Sixth Amendment, which is ensure a fair trial. *Id.* at 686. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Id.* This definition of the Constitution's requirement forms the background to the now-familiar two-prong test for ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable.

Id. at 687 (quotes in the original). The Supreme Court went on to state that, when asserting ineffectiveness, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88.

Notably, the Court resisted adopting any lists or specifications regarding counsel's conduct beyond an objective standard of reasonableness, stating that "[m]ore specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." *Id.* at 688. The Court reiterated that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

The Court then addressed the basic duties that an attorney should provide in order to be effective

under the Sixth Amendment. *Id.* at 688. However, the Court cautioned that "[t]hese basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." *Id.* at 688. In this context, the Court cited to the American Bar Association's guidelines for representation in a criminal case as a measure of "prevailing norms of practice." *Id.* at 688-89. The following is the Court's complete discussion of the ABA guidelines in *Strickland*:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, *but they are only guides*. 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. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.*

Id. (Emphasis added, citations omitted.)

The Court has consistently applied the test for ineffectiveness it articulated in *Strickland*, and has reaffirmed its resistance to implementation of specific guidelines or rules beyond simply an objective standard of reasonableness. For example, in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), in rejecting a bright-line rule that counsel must always consult with the defendant regarding an appeal, the Court reiterated, quoting *Strickland*, that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel." 528 U.S. 477, 480 (citations omitted). Regarding the ABA Standards for Criminal Justice, the Court again quoted *Strickland* that the ABA standards "are only guides, and imposing specific guidelines on counsel is not appropriate." *Id.* at 479 (citations and quotations omitted). The Court further stated that "while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Id.* (citations omitted).

The Court further explained its resistance to imposing specific guidelines as follows:

> But we have consistently declined to impose mechanical rules on counsel – even when those rules might lead to better representation – not simply out of a deference to counsel's strategic choices, but because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, ... [but rather] simply to ensure that criminal defendants receive a fair trial."

Id. at 481 (quotations in original, citations omitted). *See also Burger v. Kemp*, 483 U.S. 776, 788-95 (1987) (citing and quoting *Strickland* in rejecting defendant's ineffective assistance of counsel claim regarding attorney's strategic decision not to develop and present evidence of defendant's troubled family background); *Darden v. Wainwright*, 477 U.S. 168, 185-87 (1986) (citing and quoting *Strickland* in rejecting defendant's ineffective assistance of counsel claim regarding attorney's strategic decision not to present certain evidence at sentencing phase).

In *Williams v. Taylor*, the Supreme Court held that Williams' constitutional right to the effective assistance of counsel as defined in *Strickland* was violated. 529 U.S. at 399. In its discussion of Williams' attorney's performance at sentencing, the Court stated that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)." *Id.* at 396. The above-cited quote is the only reference that the Court made to the ABA Standards in *Williams*. The Court, in *Williams*, did not expound on its previous position taken in *Strickland*, that the ABA Standards are to be used by capital defense counsel as "guides as to determining what is reasonable" when litigating a death penalty case.

In *Wiggins v. Smith*, petitioner claimed that his attorney's performance at sentencing violated his Sixth Amendment right to effective assistance of counsel. 539 U.S. 510, 520-21 (2003). Wiggins' ineffective assistance of counsel claim stemmed from his attorney's decision to limit the scope of their investigation into potential mitigating evidence. *Id.* at 521. In deciding whether Wiggins' attorneys provided constitutionally effective assistance of counsel, the Court focused on whether the investigation

supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable. 539 U.S. at 523. In doing so, the Court relied on the professional standards that prevailed in Maryland in 1989 (the time that Wiggins' case was litigated) and the standards for capital defense work articulated by the ABA. *Id.* at 524.

In discussing the ABA standards for capital work, the Court described them as "standards to which we long have referred as 'guides to determining what is reasonable.'" 539 U.S. at 524. Although the Court referred to the ABA standards for capital work as a guide in determining what constitutes reasonable actions by an attorney, the Court also reiterated its holding in *Strickland* and stated that, "[w]e have *declined to articulate specific guidelines for appropriate attorney conduct* and instead have emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Id.* at 521 (emphasis added, citations omitted). The Court also warned that imposing specific requirements on counsel's duty to investigate and present mitigating evidence would "interfere with the 'constitutionally protected independence of counsel' at the heart of *Strickland*. *Id.* at 533 (citations omitted).

In dissenting from the majority opinion, Justice Scalia, joined by Justice Thomas, noted that *Strickland* emphasizes that "[t]here are countless ways to provide effective assistance in any given case," and also that "[p]revailing norms of practice as reflected in American Bar Association standards and the like … are guides to determining what is reasonable, *but they are only guides*." 539 U.S. at 546-47 (emphasis in original).

In *Rompilla v. Beard*, the Court again addressed an ineffective assistance of counsel claim grounded in defense counsel's failure to examine the file on the defendant's prior conviction for rape and assault, despite the fact that the defendant and his family suggested that no mitigating evidence was available. 545 U.S. 374, 377 (2005). In a 5-4 decision, the Court found that defense counsel was

deficient in failing to examine the court file on the defendant's prior conviction. 545 U.S. at 383. In reaching this conclusion, the Court discussed the ABA Standards for Criminal Justice's description of defense counsel's obligation to investigate, referring again to *Strickland's* language describing the ABA standards as "guides to determining what is reasonable." *Id.* at 387 (citations omitted). However, in response to the dissent, the majority still denied that it was imposing a "rigid *per se*" rule regarding conduct of counsel. *Id.* at 389.

In a concurring opinion, Justice O'Connor reiterated that the Court was not imposing any rigid requirement, but rather was applying the *Strickland* reasonableness standard. 545 U.S. at 393-94. In dissenting from the majority opinion, Justice Kennedy, joined by Justices Rehnquist, Scalia, and Thomas, argued that the Court had imposed a rigid requirement on defense counsel that "has no place in our Sixth Amendment jurisprudence and, if followed, often will result in less effective counsel by diverting limited defense resources from other important tasks in order to satisfy the Court's new *per se* rule." *Id.* at 397. The dissent goes on to point out that "[a] *per se* rule requiring counsel in every case to review the records of prior convictions used by the State as aggravation evidence is a radical departure from *Strickland* and its progeny." 545 U.S. at 399. The dissent quotes *Strickland* and cites *Wiggins* and *Flores-Ortega* for the Court's previous warnings against the creation of "specific guidelines" or "checklists" for evaluating counsel's performance. *Id.* (citations omitted). Justice Kennedy further pointed out that the Court has used the ABA Standards for Criminal Justice as a useful point of reference, but they "are only guides." *Id.* at 399-400 (citation omitted).

Thus, although the majority and the dissent differ regarding the effect of the Court's holding in *Rompilla*, *all* seem to agree that *Strickland's* rejection of *per se*, mechanical rules is still the law. Even the Court's recent decisions using the ABA Guidelines as a reference point to find counsel ineffective have steadfastly refused to adopt any mechanical rule. As such, the "primary aim" of Ms.

VanDreumel's petition to amend Rule 8.2(a)(4) is faulty:

> [This Petition's] primary aim is ensure counsel's ability to comply with the practitioner specific guidelines set forth in the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised February 2003) as incorporated into Rule 6.8 by Order of this Court, effective January 1, 2007.

(Petition to Amend, at 1.) The petition also asserts:

> The current version of the Rule pre-dates the incorporation of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases into Arizona's Rules of Criminal Procedure, Rule 6.8, and similarly pre-dates the standards articulated by the United States Supreme Court in *Wiggins v. Smith* and *Rompilla v. Beard*.

(Internal citations omitted.) However, as just illustrated, the standard for ineffective assistance counsel was and is unchanged—as has been recognized by this Court, and by the United States Supreme Court. The standard remains the *Strickland* standard. Moreover, any implication that capital defense trial counsel will be generally presumptively "ineffective" is utterly speculative and inappropriate before any trial or verdict in any specific case. The proposed amendment to Rule 8.2(a)(4) is thus grounded in a false assumption, and is therefore unsupported and unnecessary.

The 2007 Arizona Supreme Court Death Penalty Task Force

In 2007, this Court convened a Death Penalty Task Force specifically to address (and reduce) delay in capital litigation. The Task Force was comprised of prosecutors, defense lawyers, victim advocates, and judges. The task force considered and rejected the very proposal Ms. VanDreumel now advances, finding that the current 18-month time frame provides adequate time for the investigation and preparation for both parties to a capital trial. In doing so, the Task Force rejected the arguments advanced by Ms. VanDreumel that, while investigation and preparation by defense counsel begins when appointed at a first-degree murder defendant's arraignment, such investigation is automatically and necessarily deficient if the State alleges the death penalty within the statutorily allotted time frame. (*See*

Petition to Amend, at 8-10.) In other words, the careful investigation and preparation that defense counsel would do for a first-degree murder defendant from the time of arraignment is not deficient if and when the case becomes a capital case. The additional resources and time currently allotted through Rule 8.2(a)(4) and the relevant statutes that then become available are sufficient. Simply put, Ms. VanDreumel's assertion that "[u]nder *any* Constitutional or Guideline standard, [18 months] is untenable" is without support. (Petition to Amend, at 10, emphasis in original). This Court's Death Penalty Task Force also concluded as much.

Victim's Rights

The Victim's Bill of Rights ensures to victims "a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence." Ariz. Const. art. II, § 2.1(10); Ariz. R. Crim. P., Rule 39(b)(15). This Court has recognized this important right:

> We are obligated by the Arizona Constitution to attempt to protect the rights of the victims of crime, which includes the right to a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence. This case has, regrettably, already been in the courts far too long. If we were to accept defendant's present arguments, this case, and others like it, would go on indefinitely.
>
> * * *
>
> Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions shows only that conventional notions of finality should not have *as much* place in criminal as in civil litigation, not that they should have *none*.

State v. Mata, 185 Ariz. 319, 337, 916 P.2d 1035, 1053 (1996) (internal citations, quotations and modifications omitted, emphasis in original). *See also*, *State v. Hickman*, 205 Ariz. 192, ¶ 33, 68 P.3d 418 (2003) (finding 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. Towery*, 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.'").

Sometimes, a victim's constitutional right must be subordinated to a defendant's federal constitutional trial right. For example, 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." *P.M. v. Gould*, 212 Ariz. 541, ¶18, 136 P.3d 223 (App. 2006) (emphasis added), *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 holding that 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.).

While Ms. VanDreumel acknowledges the victim's right to a speedy trial, her proposed amendment to Rule 8.2(a)(4) thwarts this important constitutional right by adding unjustified delay while advancing no specific corresponding federal constitutional trial right for a criminal defendant. Her general assertions regarding a defendant's right to a speedy trial, right to effective assistance of counsel, and right to present a defense do not adequately point to a specific instance where a defendant's federal constitutional right trumps a victim's right to a speedy trial. (*See* Petition to Amend, at 11.) The assertion that, unless all capital trials are delayed by adoption of the proposed rule, every capital defendant's federal constitutional right to a speedy trial, to effective assistance of counsel, and to present a defense will automatically be violated is unfounded and speculative. This Court should uphold

////

////

////

////

and defend the victim's constitutional right to a speedy trial in the face of this unsupportable, generalized speculation.

For each of the reasons set forth above, this Court should reject this proposal.

Respectfully submitted this 19th of May, 2008.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

BY: _____
PHILIP J. MACDONNELL
CHIEF DEPUTY

JAMES P. BEENE
DEPUTY COUNTY ATTORNEY

Copies of the forgoing mailed
this 16th day of May, 2008 to:

Clerk of the Court
Arizona Supreme Court

Treasure VanDreumel
Law Office of Treasure VanDreumel, PLC
2000 N 7th Street
Phoenix, AZ 85006