

ARIZONA SUPREME COURT

In the Matter of:

PETITION TO AMEND RULE
8.2(a)(4), ARIZONA RULES OF
CRIMINAL PROCEDURE

SUPREME COURT NO. ____

OPPOSITION TO PETITION TO
AMEND RULE 8.2(a)(4)

Arizona Attorney General Terry Goddard opposes the pending Petition to Amend Rule 8.2(a)(4) of the Arizona Rules of Criminal Procedure to enlarge the time within which a capital case must be tried. The current version of Rule 8.2 provides that trial shall occur within 18 months from arraignment; Petitioner seeks to expand that time to 2 ½ years (30 months) from the date the State files a notice of intent to seek the death penalty (instead of from date of arraignment) or from the date a new trial is ordered.

The proposed amendment should be rejected because it would exacerbate the significant problem of delay in capital cases. There is already a mechanism in place under Ariz.R.Crim.P. 8.5 for seeking additional time upon a showing of extraordinary circumstances if necessary to serve the interests of justice. The proposed expansion of time is unwarranted and conflicts with crime victims' constitutionally mandated right to a speedy trial or disposition. Additional time

prior to trial affects the reliability of evidence, which in many instances is based on witnesses' ability to recall facts and events. Moreover, the added time will only increase delay in a deadline-driven process, and will add to the overall delay in a process that includes more than 17 years of appellate and post-conviction proceedings. Accordingly, and for reasons set forth in the accompanying Memorandum of Points and Authorities, the petition to amend Rule 8.2(a)(4) should be denied.

RESPECTFULLY SUBMITTED this 20th day of May, 2008.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ADDITIONAL DELAY IN AN ALREADY-DELAYED PROCESS IS UNWARRANTED.

Attorney General Goddard objects to an expansion of the time period before trial in a capital case because such an expansion conflicts with victims' (and the State's) interest in a prompt resolution of the trial and appellate process. See A.R.S. Const. Art. 2 § 2.1. The current rule sets a presumptive time frame of 18 months from the date of arraignment and provides for additional time if necessary to serve the interests of justice. See Ariz.R.Crim.P. 8.2(a)(4); 8.5. During that time period, a defendant in a capital case is appointed two highly-qualified defense attorneys (see Ariz.R.Crim.P. 6.8), and funds are made available for investigative and expert assistance. See Ariz. Rev. Stat. § 13-4013(B)(1989) (requiring counties to pay for experts and investigators in capital proceedings upon a showing that it is reasonably necessary to provide an indigent defendant's defense); *State v. Bocharski*, 200 Ariz. 50, 62, 22 P.3d 43, 55 (2001). Petitioner's requested amendment would expand the time prior to trial by more than 14 months, and is unwarranted.¹ Petitioner has not

¹The State is currently required to file a notice of intent to seek the death penalty within 60 days of arraignment. Ariz.R.Crim.P. 15.1(i). This period may be extended for 30 days by stipulation of counsel and extended further upon motion by the State and approval by the court. *Id.* Accordingly, Petitioner's request to expand the time to 30 months from the date a notice of intent to seek the death penalty is filed would expand the time period by at least 14 months.

demonstrated that the 18-month presumptive time period is inadequate to prepare for trial under the framework provided for indigent defense in Arizona.

Attorney General Goddard recognizes the importance of pre-trial preparation in ensuring a just resolution in capital cases, and that time and money spent at the beginning of the process should, in theory, lessen the need for lengthy appellate and post-conviction proceedings. However, added time does not necessarily increase the reliability of the process, particularly with regard to witnesses whose testimony is based on their memory of events and circumstances. Furthermore, the reality of capital litigation in Arizona has been that improvements in the pre-trial process, including the appointment of two qualified attorneys prior to trial, have not shortened the appellate and post-conviction process, which averages more than 17 years in state and federal court. *See Arizona Attorney General's Capital Case Commission Report, Data Set 1, Exhibit 3* (17.4 years is median time period from imposition of death sentence to execution for cases in which death was imposed between 1974 and July 1, 2001). This Court's focus, through its rule-making process, should be to ensure that adequate time and resources are available to properly try a capital case, while still protecting victims' and the State's interest in a reasonably prompt resolution of the case. The current version of Rule 8.2, with its

provision for more time when necessary to carry out the interests of justice, adequately does that and should not be expanded.²

Petitioner suggests that Arizona's 2002 change to jury sentencing in capital cases compels the conclusion that additional pre-trial time is necessary, because counsel is now required to prepare for sentencing prior to the guilt phase. Petitioner asserts that, prior to jury sentencing, after a defendant was found guilty of first-degree murder following trial, "the aggravation/mitigation phase was postponed between one to two years to permit the State to formally allege aggravating factors it would seek to prove beyond a reasonable doubt before the trial judge and to prepare for the aggravation phase. . ." (Petition, at 2-3.) Petitioner further asserts that [d]uring this "post-verdict one-to-two year time period," defense counsel conducted a thorough investigation into the convicted defendant's background, history and character in order to establish the existence of mitigating factors justifying a sentence less than death." (*Id.*)

Petitioner's statistical information conflicts with data generated by the Arizona Attorney General's Capital Case Commission in 2002. In Exhibit 12 to the Data Set II Research Report submitted with the Commission's Final Report, the Commission provided statistical information relating to time intervals for Arizona death-noticed cases from 1995-1999, noting a median time of 5.7

²Additionally, Ariz.R.CrimP. 8.1(e) provides for the suspension of Rule 8 upon a showing of extraordinary circumstances in a particular case.

months between the verdict at the guilt phase and the imposition of sentence. (The median time from indictment to guilt phase verdict in capital cases was 1.5 years.) Setting a new time frame of more than 2 1/2 years from the notice of intent to seek the death penalty would not lead to a closer approximation of trial preparation prior to Arizona's 2002 change to jury sentencing and would instead build in additional delay.

II. THE ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES DO NOT ESTABLISH A BASIS FOR THE REQUESTED ENLARGEMENT OF THE PRE-TRIAL TIME PERIOD.

Petitioner incorrectly asserts that “[t]he 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.” (Petition, at 2, emphasis added.) Petitioner’s argument is flawed because Arizona’s Rules of Criminal Procedure have not incorporated the ABA Guidelines.

In 2006, the Arizona State Bar Indigent Defense Task Force unsuccessfully sought an amendment to Rule 6.8 to incorporate the performance standards set forth in the ABA Guidelines into the Arizona Rules of Criminal Procedure. At the time of the proposed amendment, Rule 6.8 provided that lead counsel in a capital case “[s]hall be familiar with the American Bar Association Guidelines

for the Appointment and Performance of Counsel in Death Penalty Cases.” Ariz.R.Crim.P. 6.8(b)(1)(iii) (2000). This Court rejected the request to incorporate the ABA Guidelines in their entirety into Rule 6.8 and instead modified the Rule to provide that an attorney “[s]hall 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.” Ariz.R.Crim.P. 6.8(b)(1)(iii) (2006). This Court specifically noted in its 2006 Comment to Rule 6.8 that the ABA Guidelines as a whole have not been specifically incorporated into the Rule:

The American 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 professional judgment, counsel should be guided by the performance standards when applicable.

(Emphasis added.) Thus, Arizona has not incorporated the ABA Guidelines into Arizona’s Rules of Criminal Procedure, and there is no need to change the current version of Rule 8.2 to comport with the minor change in the language of Rule 6.8. The 2006 amendment to Rule 6.8 did not change the landscape of capital defense representation in Arizona, since attorneys who were “familiar with” the ABA guidelines were presumably “guided by” those guidelines. Accordingly, the 2006

amendment does not provide a basis for expanding the pre-trial time frame set forth in Rule 8.2.

III. THE UNITED STATES SUPREME COURT'S CAPITAL CASE JURISPRUDENCE DOES NOT SUPPORT THE REQUESTED EXPANSION OF TIME.

Petitioner argues that the current version of Rule 6.8 also “pre-dates the standards articulated by the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), and *Rompilla v. Beard*, 125 S. Ct. 2456, 545 U.S. 374 (2005).” (Petition, at 2.) However, neither *Wiggins* nor *Rompilla* altered the assessment of an attorney’s duties, as previously outlined in *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2050 (1984). In *Strickland*, in discussing the performance prong of the test for whether an attorney rendered effective assistance of counsel under the Sixth Amendment, the United States Supreme Court emphasized that the proper measure of attorney performance is “reasonableness under prevailing professional norms.” *Id.* at 688. The Court cited to the ABA standards in effect at that time, but relied on them as guidelines only, and not as mandatory standards:

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. at 688-89 (emphasis added, citations omitted).

Neither *Wiggins* nor *Rompilla* changed the *Strickland* standard to incorporate the ABA Guidelines. See *Wiggins*, 539 U.S. at 521, 533 (reiterating 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,’ and warning that imposing a specific requirement on counsel’s duty to investigate and present mitigating evidence would ‘interfere with the constitutionally protected independence of counsel’ at the heart of *Strickland*.”); *Rompilla*, 545 U.S. at 393-94 (J. O’Connor, concurring) (reiterating that although the ABA Standards are guides to determining what is reasonable, the Court was not imposing any rigid requirement, but was applying the *Strickland* reasonableness standard).

The United States Supreme Court has never held that the ABA standards as a whole represent the standard for determining effective assistance of counsel and should be mandatory in every case. In fact, the Court stated the opposite in *Jones v. Barnes*, 463 U.S. 745, 753, n. 6 (1983): “In any event, the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not

mean that that practice is required by the Constitution.” *Strickland* and its progeny, including *Wiggins* and *Rompilla*, have not altered that position.

IV. DIFFICULTY IN OBTAINING COOPERATION FROM A DEFENDANT IS NOT A VALID BASIS FOR EXPANDING THE TIME PERIOD PRIOR TO TRIAL.

Petitioner asserts that difficulties in obtaining a client’s cooperation in a mitigation investigation create a need additional pre-trial time to prepare for a mitigation presentation in the event the defendant is convicted of first-degree murder. This assertion ignores, however, the defendant’s right to determine whether to present mitigation, and assumes that the ABA Guideline (10.7) requiring that a mitigation investigation be conducted “regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented” is the law in Arizona or in the United States. That assumption does not reflect current case law regarding investigation and presentation of mitigation over a defendant’s objection. *See Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990) (affirming a death sentence where “[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, [the defendant] decided not to present any proof of mitigating evidence”); *Schriro v. Landrigan*, ___ U.S. ___, 127 S. Ct. 1993, 1942 (2007) (noting that no in-court colloquy is required before allowing a defendant to restrict presentation of mitigation; defendant who objected to presentation of mitigation

at sentencing could not establish that he was prejudiced by counsel's alleged failure to investigate mitigation).

Both *Wiggins* and *Rompilla* similarly reject the conclusion that a "complete" mitigation investigation is required in every case regardless of the client's wishes. In *Wiggins*, the Court held that counsel's decision not to expand their investigation beyond a presentence report and Department of Social Services records fell short of the professional standards that prevailed in Maryland in 1989. 539 U.S. at 524. However, the Court also stated: "[w]e emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Id.* at 533.

In *Rompilla*, the Court faulted defense counsel for failing to research the defendant's prior convictions, which related to aggravating circumstances asserted by the State. The Court noted that researching the circumstances underlying those prior convictions may have provided mitigating information, and ruled that counsel was ineffective for having failed to do so. 545 U.S. at 385-86. Contrary to Petitioner's assertion, however, the focus in *Rompilla* was not counsel's duty to investigate mitigation, but instead a duty to rebut evidence of aggravation: "We hold that even when a capital defendant's family members and the defendant

himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.” *Id.* at 377.

Defense counsel does not have an unfettered duty to conduct a scorched-earth mitigation investigation regardless of the defendant’s wishes or willingness to cooperate. Building in additional delay based on a defendant’s refusal to cooperate with counsel is unwarranted and in fact simply rewards recalcitrant behavior. Leaving the current Rule 8.2 time frame in place provides an incentive for earlier involvement by the defendant in the mitigation process. The proposed expansion of the Rule 8.2 deadlines would simply push back the date when a defendant would be forced to decide whether to cooperate with counsel.

V. CURRENT ADMINISTRATIVE DELAYS SHOULD BE ADDRESSED, RATHER THAN USED AS A BASIS FOR EXPANDING RULE 8.2 DEADLINES.


Petitioner argues that, when Rule 8.2 was modified in 2002, “the Arizona Supreme Court could not have predicted practical considerations such as the limited number of qualified attorneys available to defend capital cases or the number of capital cases those lawyers can effectively handle.” (Petition, at 4.) Petitioner also cites, as a basis for additional time, the “scant number of qualified mitigation specialists available to assist each capital defendant” and notes scheduling problems with mitigation specialists and experts. (*Id.*)

Petitioner's argument is unpersuasive as a basis for extending time periods for trial preparation. To the extent there are administrative problems in hiring or scheduling mitigation specialists and experts, those problems should be separately addressed. Simply pushing back deadlines will not address scheduling concerns, and will instead build in additional delay in the process. The current Rule provides a framework for seeking additional time on a case-by-case basis when the interests of justice so require (Ariz.R.Crim.P. 8.2(d); 8.5), and the proposed amendment to expand time frames under Rule 8.2 should be rejected.

CONCLUSION

The Petition to Amend Rule 8.2 should be denied. This Court, through its rule-making authority, should not incorporate additional delay in an already-delayed capital trial and appeals process. Victims' and the State's interest in the prompt resolution of first-degree murder cases should not be thwarted by expanded deadlines that may simply result in postponing the date when initial requests for more time are sought. A defendant's right to a fair trial is not limited by the current rule, since there is already a mechanism in place to provide for more time when necessary to advance the interests of justice. Accordingly, the proposed amendment to Rule 8.2 should be rejected.

RESPECTFULLY SUBMITTED this 20th day of May, 2008.




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Copies of the foregoing Comment have been delivered this 20th day of May, 2008 to:

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