Arizona Capital Representation Project
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IN THE SUPREME COURT OF ARIZONA

In the Matter of: Petition to Amend Rule 32.7, Arizona Rules Of Criminal Procedure.	)	Supreme Court No. R-08-0042
	)	Comment to Capital Case Oversight Committee Proposed Amended Rule of Criminal Procedure 32.7

The Arizona Capital Representation Project ("Project") is a nonprofit death penalty resource center committed to improving representation of death-sentenced inmates and defendants facing a possible death sentence in the State of Arizona. Since 1989, the Project has directly represented dozens of capital prisoners, assisted in the cases of hundreds of other capital prisoners, drafted voluminous written materials regarding capital case issues and provided numerous training seminars to capital defense attorneys throughout Arizona. As a result of this extensive work, the Project is thoroughly familiar with the standards for constitutional and fair proceedings in capital cases. The Project hereby provides the following comment regarding the Capital Case Oversight Committee's proposed changes to Arizona Rule of Criminal Procedure 32.7.

The Project opposes the proposed rule amendment for the reasons explained below.

1. The Proposed Amendment is Superfluous

As a fundamental matter, current Rule 32.7 provides: "The court may at any time hold an informal conference to expedite the proceeding." The new language mandates an informal conference within 90 days after the appointment of postconviction counsel. Such a conference may already be held under the language of the current rule. No legitimate purpose is served by usurping the superior court's discretion to hold a conference *sua sponte* or by motion of a party. The reasoning set forth by the Capital Case Oversight Committee ("Committee") is speculative: "The majority [of the Committee] *believed* that if a conference was discretionary, *certain* judges *might* choose not to set one." Petition to Amend Rule 32.7, p.3 (emphasis supplied). This is not a compelling reason to overhaul a rule, especially in light of the policy and constitutional concerns discussed *infra*.

2. The 90 Day Timeframe of the Proposed Amendment is Arbitrary

The Capital Case Oversight Committee provides no reasoning for the timing of the proposed initial conference. To the contrary, the Committee explains its consensus is that "it would be unproductive to discuss matters such as discovery, or even a deadline for when the petition would be filed, at an initial conference. Every capital case is unique, and the initial informal conference…[is] too early in the process for detailed timelines or discussions of particular issues." Petition to Amend Rule 32.7, p.3. The Committee's own reflections highlight the superfluous nature of this mandatory conference and the rationale for leaving the current rule, where the court and parties initiate the timing of the conference, in tact. *See* §1, *supra*.

The Committee continues, "However, the initial informal conference would be an opportunity to discuss defense counsel's acquisition of the file, to obtain any preliminary assistance from the court that might be appropriate in securing records, and to establish, but only to the extent possible, a general schedule for future proceedings." Petition to Amend Rule 32.7, p.3. As to the first point, defense counsel's acquisition of the file and enlistment of the court's assistance may be an *ex parte* matter, or at minimum, an issue litigated without the input of the state. 17 A.R.S. Supreme Court Rules, Rule 42, Arizona Rule of Professional Conduct, ER 1.6(a)("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent. . .."). As the Committee notes, every capital case is unique. Counsel are necessarily in the best position to determine whether a status conference is in the best interests of their client in resolving file acquisition issues.

As to the Committee's second point, the "general schedule for future proceedings" is already delineated by Rule 32.4(c)(1). This rule requires a capital postconviction petitioner to file a petition for postconviction relief within 120 days of the filing of the notice,[1] and provides structure for requests for extensions of time. Further, if a capital defendant fails to file a petition within 180 days of the filing of the notice or appointment of postconviction counsel, he or she is required to file a notice in this Court advising on the state of

[1] Presently, in light of long delays in the appointment of postconviction counsel, this Court is staying proceedings after filing the notice in order to toll statutory deadlines and protect capital defendants' constitutional rights. *See e.g. State v. Armstrong*, AZ Supreme Court No. CR-06-0443-AP, Mandate (4/2/09)(ordering the Clerk of the Court to issue the Notice of Post-Conviction Relief; ordering suspension of the time limit in rule 32.4(c)(1) "until qualified counsel agrees to accept appointment and is appointed by the Court.").

proceedings and continue to file status reports until the petition is filed. 32.4(c)(1). Under this scheme, the "general schedule" is clear and expediency is well-emphasized.

The arbitrariness of the 90 day timeframe takes on a new significance when federal statutory deadlines are considered. Under the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) and Arizona Rule 6.8(b)(1)(iii), state postconviction counsel have an ethical and professional duty to be "intimately familiar with federal habeas corpus procedures." Commentary to Guideline 10.15.1, p.127, *Duties of Post-Conviction Counsel.*

> As described in the commentary to Guideline 1.1, providing high quality legal representation in collateral review proceedings in capital cases requires enormous amounts of time, energy, and knowledge. The field is increasingly complex and ever-changing. As state and federal collateral proceedings become ever-more intertwined, counsel representing a capital client in state collateral proceedings must become intimately familiar with federal habeas corpus procedures. As indicated above, for example, although the AEDPA deals strictly with cases being litigated in federal court, its statute of limitations provision creates a de facto statute of limitations for filing a collateral review petition in state court. Some state collateral counsel have failed to understand the AEDPA's implications, and unwittingly forfeited their client's right to federal habeas corpus review.

Id. (footnote describing preventable executions omitted). Under AEDPA, a capital defendant is ordinarily subject to a one-year statute of limitations. 28 U.S.C. 2244. However, "special habeas corpus procedures" may apply to federal habeas corpus petitions in capital cases if a state's postconviction procedures satisfy certain prerequisites. *See* 28 U.S.C. §§ 2261, 2263. Thus, the deadline for filing of a federal habeas corpus petition by capital prisoners in qualifying "opt-in" states is 180 days, *id.*, in contrast to the one-year limitations period that would otherwise apply. In *Spears v. Stewart*, the Ninth Circuit found

that *on its face*, Arizona satisfied the opt-in requirements. 267 F.3d 1026 (9th Cir. 2001), *amended by Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2002).

Under AEDPA, a client's one-year statute of limitations for filing a petition for federal habeas corpus relief generally begins to run upon the denial of certiorari or when the 90 days for filing a petition has elapsed. However, under "opt-in," 28 USC §2263(b), an inmate has only 180 days from the "*affirmance* of the conviction and sentence on direct review[.]" Although we strongly disagree, the state may argue this means either (1) the order denying the motion for reconsideration or (2) the direct appeal opinion if a motion for reconsideration is not filed. The 180-day opt-in statute of limitations is not tolled until the filing of a petition for certiorari. Once certiorari is denied, the time begins to run again and is not tolled until the *petition* for postconviction relief is filed. In an opt-in jurisdiction, filing the notice of petition for postconviction relief may not be sufficient to stop the clock. *Compare with Isley v. Ariz. Dep't of Corr.,* 383 F.3d 1054, 1055-56 (9th Cir.2004)(holding tolling under 2254(d)(2)'s "properly filed" provision begins in Arizona when the Notice of Postconviction Relief is filed).

Under these circumstances, should Arizona seek and be certified as an "opt-in" state, it is entirely possible that state postconviction counsel would forfeit his or her client's right to federal habeas review by the time of the proposed initial conference. (Depending on, *inter alia*, the amount of time used by direct appeal counsel to prepare the petition for certiorari

and whether that time counted against the federal statute of limitations.) In this regard, the Proposed Amendment to Rule 32.7 is not expedient enough.[2]

3. The Proposed Amendment Asymmetrically Emphasizes Expediency in Capital Cases

The Proposed Amendment places a special emphasis on expediency in capital versus non-capital postconviction cases. Proposed Amended Rule 32.7 ("In a capital case,…"). This is illogical given the complexity of capital cases and counsels' "unparalleled" obligations to their clients. ABA Guideline 10.7 ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty"); Commentary to ABA Guideline 10.15.1, p.127-28 (postconviction investigation should be more comprehensive than that conducted at trial, for a number of reasons including that information may have been concealed by the state). As a matter of federal constitutional law, capital cases demand heightened procedural reliability. *Woodson v. North Carolina*, 428 U.S. 280 (1976). As a policy matter, since capital cases are the most complex cases in our criminal justice system and have the most dire consequences, capital cases should be granted more flexibility and resources than non-capital cases. The Proposed Amendment, however, mandates *less* flexibility in capital cases than in non-capital cases, by setting forth a mandatory initial conference to be applied *only* in capital cases. Imposing such restrictions on capital cases not only impairs the requirement for heightened procedural reliability in capital cases,

[2] Competent counsel would, of course, take the appropriate litigation steps to attempt to protect his or her client's rights to federal habeas review. However, this too weighs in favor of maintaining the existing Rule 32.7 which leaves the timing of the status conferences to the discretion of the court with the input of the parties.

but also sends the message that the death penalty is highly politicized, rather than fair and impartial.

4. The Proposed Amendment Creates a Risk of an Incomplete Record in Capital Cases

The existing Rule 32.7 provides: "The defendant need not be present if the defendant is represented by counsel who is present." The Committee indicates that "informal conferences are typically held in chambers, and the majority [of the Committee] believe[s] that there is no requirement that anyone other than counsel be present at an informal conference." Petition to Amend Rule 32.7, p.4. This belief stems specifically from the Committee's "concerns about costs and security in transporting death row inmates to the superior court for an informal conference." *Id.* As a result, the Committee concludes that the existing Rule 32.7 addressees who should be present and does not recommend any change to the existing language.

A capital petitioner's optional presence under Rule 32.7 is subject to constitutional limits. *See Rushen v. Spain*, 464 U.S. 114, 117 (1983)("the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant"); *Bonin v. Vasquez,* 999 F.2d 425, 429 (9th Cir. 1993)(petitioners have a right to due process in collateral proceedings). Proceedings "held outside the defendant's presence are fraught with danger and should be conducted, if at all, only for valid reasons and only where the record clearly shows that the defendant has waived his right to be present." *State v. McCrimmon*, 187 Ariz. 169, 171, 927 P.2d 1298, 1300 (1996)(capital case). As the Committee points out, each capital case is unique, and as such, the unique circumstances of each case

will dictate the subject matter of the informal conference. Depending on the subject matter, a capital petitioner's presence may not be constitutionally "optional." The Proposed Amendment fails to address this situation in either the language of the rule or its comment.

Of great concern is the Committee's omission of the presence of a court reporter from its discussion of in chambers conferences. Petition to Amend Rule 32.7, p.4. In a capital case the need for a full and complete record is an important safeguard against arbitrariness and capriciousness. *Dobbs v. Zant*, 506 U.S. 367, 368 (1993); *see also, Gardner v. Florida*, 430 U.S. 349 (1977); *Gregg v. Georgia*, 428 U.S. 153, 167, 198 (joint opinion of Stewart, Powell, and Stevens, J.J.)(state capital sentencing provision regarding the transmittal on appeal of complete transcript and record is an important "safeguard against arbitrary and caprice"). Should this Court adopt the Proposed Amendment, it is imperative that it indicate "informal" conferences be recorded and transcribed. *See* Commentary to ABA Guideline 10.4, *The Defense Team*, p.67, n.175 (discussing postconviction counsel's duty to make a record to adequately protect a client's federal habeas remedies); Guideline 10.7(B)(2), *Investigation*, ("Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate."); Guideline 10.8(B)(2), *Duty to Assert Legal Claims*, ("Counsel who decide to assert a particular legal claim should…ensure that a full record is made of all legal proceedings in connection with the claim.") Mandating the presence of a court reporter will rectify the dubious language in the rule and comment regarding "informal[ity]."

In sum, the Project views the Proposed Amendment as largely unnecessary, ineffective, and in some respects, perilous. We thank you for the opportunity to comment on this proposal. Please contact us should you have any further questions.

Respectfully submitted this 20th day of May, 2009.

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A copy of this comment has been mailed this 20th day of May, 2009 to:

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