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10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**

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13 In the Matter of:

Supreme Court No. R-14-0012

14 PETITION TO AMEND RULE 32.4,
15 ARIZONA RULES OF CRIMINAL
16 PROCEDURE

**COMMENT OF
THE STATE BAR OF ARIZONA**

17 The Maricopa County Superior Court Criminal Department presiding judge
18 has proposed amending Rule 32.4, Ariz. R. Crim. P., to allow for a recording of the
19 relevant proceedings to be provided to the defendant, instead of a transcript, in the
20 discretion of the court reviewing the petition. The State Bar of Arizona opposes this
21 proposed amendment and respectfully requests that it be rejected.

22 Rule 32.4 governs post-conviction proceedings and provides that post-
23 conviction-relief (PCR) defendants are entitled to official transcripts of proceedings
24 on request so they can review the record for viable claims that can be raised in PCR
25 proceedings as well as to support the claims raised. Indigent defendants receive
transcripts at county expense, while non-indigent defendants are responsible for
paying the costs of transcripts.

The Maricopa County Superior Court records certain court proceedings via
audio/video equipment known as "For the Record" ("FTR") instead of court

1 reporters. Recorded proceedings are provided on compact disk. Certain justice courts
2 also use FTR. The Phoenix Municipal Court uses FTR to record all criminal court
3 proceedings. These recordings constitute the official record for purposes of appeal
4 and post-conviction relief. However, in city court cases lasting more than one hour,
5 transcripts are prepared for appeal and PCR.¹ Rule 32 applies to convictions arising
6 from superior, justice and municipal courts.

7 The petition seeks to permit the court to provide “the record” rather than
8 “transcripts” to a defendant or his counsel. The modification is intended to permit
9 the disclosure of audio/video recordings in place of official transcripts in
10 circumstances in which the court “deems necessary to resolve the issues to be raised
11 in the petition.” But how would the court know what issues might be raised in post-
12 conviction proceedings before the defendant or his counsel receives and reviews the
13 record?

14 The proposed rule grants the court the unfettered discretion to provide either
15 an official transcript or an FTR regardless of the type of proceeding (trial or plea,
16 capital or non-capital) and regardless of the length of the proceeding. Courts, however,
17 are ill equipped to make an informed decision as to whether the record to be provided
18 warrants transcripts versus FTR.

19 The requested change may have been intended to cover ministerial matters
20 such as “group advisements” given to multiple defendants simultaneously at the
21 beginning of their cases (such as instructing them to maintain contact with counsel,
22 appear at scheduled court dates in order to avoid the issuance of arrest warrants for
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24
25 ¹ Other municipal and superior courts may use FTR. Some justice courts use FTR
and other methods of electronic recording, sometimes merely audio.

1 failure to appear). The reality is that group advisements immediately preceding
2 arraignment are seldom if ever consequential to a PCR petition arising from either
3 superior or municipal court. Such proceedings may easily and effectively be provided
4 on FTR, if they are provided at all. Most of the time, a record of those proceedings is
5 neither sought nor obtained for purposes of PCR.

6 For actions occurring in Superior Court in which a defendant is convicted after
7 trial, transcripts of the proceedings are prepared for the direct appeal and thus are
8 typically available for the subsequent post-conviction proceeding. But sometimes
9 defendants waive their direct appeal, either by failing to timely file notice of appeal
10 or by deliberately deciding to waive the appellate process in favor of pursuing post-
11 conviction remedies instead. For these defendants, trial transcripts are necessary.

12 For defendants who plead guilty in Superior Court (and thereby waive their
13 right to appeal), the only relevant record is the change-of-plea colloquy/proceeding
14 and the sentencing proceeding. Transcripts for these short proceedings are not costly.
15 Petitioner posits that because these are short proceedings, providing an FTR as
16 opposed to transcripts is preferable because “[i]f no issue is found and no petition is
17 going to be filed, creating a certified transcript is an unnecessary expense.” But what
18 if, after review of the FTR, claims are identified and a PCR petition will be filed?
19 Will a transcript be prepared on request in that circumstance? The proposed rule does
20 not so indicate.

21 Petitioner cites *Stout v. Taylor*, 233 Ariz. 275 (App. 2013), in support of the
22 amendment. However, the paragraph cited is merely dicta and does not compel the
23 overly general modification sought here. Stout was convicted in Mohave
24 County/Kingman Justice Court following a plea to a misdemeanor. He requested a
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1 transcript of the change of plea and sentencing proceeding to pursue his right to PCR.
2 The court refused to provide anything other than audio recordings of the proceedings.
3 Stout sought special action in the Superior Court. The Superior Court denied his
4 requested relief. Stout appealed that decision. The Court of Appeals held that Rule
5 32.4 required the production of transcripts of “necessary proceedings” and that the
6 change-of-plea and sentencing proceedings were necessary to the PCR process.

7 The proposed modification also fails to differentiate between capital and non-
8 capital cases, pleading versus non-pleading defendants, group proceedings versus
9 individual proceedings or short proceedings (such as change of plea/sentencing
10 proceedings) versus lengthy proceedings (such as jury trials).

11 For defendants in custody, an FTR is worthless. For defendants who proceeded
12 to trial in a felony case and were convicted but failed to timely appeal, the FTR for
13 a trial of any appreciable length poses a difficulty for review by any court as well
14 as counsel. The expense to the court is increased if, following review of FTR,
15 an official transcript is required to evidence the claim or claims to be raised on
16 PCR. Requiring defendants and/or their counsel to review trial proceedings by
17 watching FTR *then* requesting transcripts in the event one or more potential PCR
18 issues are identified is neither cost effective nor time efficient. In such circumstances
19 the court pays for the FTR *and* the transcript. Moreover, the county pays for indigent
20 defense counsel to review the record on PCR just as it pays for court reporters to
21 prepare transcripts for indigent defendants. Requiring defense counsel to spend more
22 time reviewing FTR, then requesting transcripts (and litigating the denial of same)
23 costs more than paying court reporters to transcribe the requested proceedings in the
24 first instance. Requiring courts to actually review lengthy FTRs if transcripts are not
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1 provided is even worse.
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3 **CONCLUSION**

4 The State Bar respectfully requests that the Court reject the rule amendment
5 as proposed.
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7 RESPECTFULLY SUBMITTED this 13TH day of May, 2014.
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10 
11 John Furlong
12 General Counsel

13 Electronic copy filed with the
14 Clerk of the Arizona Supreme Court
15 this 13th day of May, 2014.

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