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7 IN THE SUPREME COURT OF THE STATE OF ARIZONA

8 IN THE MATTER OF

R-14-0010

9 PETITION TO AMEND RULES
10 31.2, 31.4, 31.13, 32.4, and 32.9,
11 ARIZONA RULES OF
12 CRIMINAL PROCEDURE

ARIZONA PROSECUTING ATTORNEYS'
ADVISORY COUNCIL'S
COMMENTS IN SUPPORT OF PETITION TO
AMEND RULES 31.2, 31.4, 31.13, 32.4, and 32.9 ,
ARIZONA RULES OF CRIMINAL PROCEDURE

13 Pursuant to Arizona Rules of the Supreme Court, Rule 28(C), the Arizona
14 Prosecuting Attorneys' Advisory Council ("APAAC") hereby submits its comments
15 in support of the Petition to Amend Rules 31.2, 31.4, 31.13, 32.4, and 32.9 of the
16 Arizona Rules of Criminal Procedure. The proposed rule change will reduce delay in
17 capital cases and enhance the reliability of capital post-conviction relief proceedings.
18 Accordingly, APAAC respectfully asks this Court to grant the petition.
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22 I. *The proposed rule change will enhance the reliability of capital post-conviction proceedings.*
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24 Conducting a Rule 32 proceeding several years after the crime detrimentally
25 affects the proceeding's reliability. With each year that passes, witnesses' memories
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1 (including those of trial counsel) fade, trial counsel's files may become disorganized
2 or misplaced and, despite safeguards in place to preserve it, evidence may be lost.
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4 *See State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984) ("When the
5 appeal is filed, the witnesses' memories and evidence are fresh and readily available
6 should a new trial be required. When a Rule 32 petition is filed, the witnesses'
7 testimony may be lost because of dimmed memories or death and physical evidence
8 may be lost, destroyed, or misplaced."). These faded memories and other factors
9 make it more difficult for a defendant to develop and prove his post-conviction
10 claims, and hinder the State's efforts to ensure, for federal habeas purposes, that a
11 claim is fully developed in state court. Conducting the post-conviction proceeding,
12 and its associated evidentiary development, prior to the direct appeal ameliorates
13 these concerns and benefits all parties involved. Witnesses, including trial counsel,
14 will be easier to locate and their memories will be fresh. Trial counsel's files are more
15 likely to be available and intact. Physical evidence is less likely to be lost or
16 misplaced.

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21 Equally important, the trial judge is more likely to be available to preside over
22 the post-conviction proceeding as Rule 32 contemplates. *See Ariz. R. Crim. P.*
23 *32.4(e)*. The trial judge's involvement dramatically increases the proceeding's
24 reliability, as the judge observed firsthand counsel's performance, the credibility of
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1 witnesses, and other factors not apparent from the record. *See Schriro v. Landrigan*,
2 550 U.S. 465, 476 (2007) (“[T]he judge presiding on postconviction review was
3 ideally situated to [determine the relevant facts] because she is the same judge that
4 sentenced [the defendant] and discussed these issues with him.”); *Smith v. Stewart*,
5 140 F.3d 1263, 1271 (9th Cir. 1998) (stating that if the judge who had presided at the
6 post-conviction proceeding were also the sentencing judge, courts “would be
7 considerably less inclined to order relief” because to do so might approach “a
8 looking-glass exercise in folly”) (quotations omitted).

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12 **II. *The proposed amendments will reduce delay in capital cases and***
13 ***thereby further Rule 32’s goals.***

14 Rule 32 is designed to reduce delay in criminal proceedings while
15 simultaneously protecting a defendant’s rights. *See Carriger*, 143 Ariz. at 145–46,
16 692 P.2d at 994–95 (1984) (Rule 32 “is not intended to unnecessarily delay the
17 renditions of justice or add a third day in court when fewer days are sufficient to do
18 substantial justice” but is “designed to accommodate the unusual situation where
19 justice ran its course and yet went awry”) (quotations omitted). In recent years, these
20 goals have not been fulfilled in post-conviction capital cases: delays due to trial file
21 assembly, locating and interviewing witnesses, and other investigative circumstances
22 have effectively stalled many cases at the post-conviction stage. Often, the post-
23 conviction proceeding is not resolved until a decade or more after the offense.
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1 (Petition, at 4–6.) This delay adversely affects the State’s interests in finality, as well
2 as the constitutional right of crime victims to a prompt and final conclusion of the
3 case. Ariz. Const. art. 2 § 2.1(A)(10).
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5 The proposed amendments would substantially reduce this delay, and further
6 Rule 32’s objectives, by streamlining the capital post-conviction investigative process
7 and removing common obstacles to the timely completion of a petition. Capital post-
8 conviction proceedings primarily involve claims of counsel’s ineffectiveness at trial
9 or sentencing. Under the proposed amendments, trial counsel’s file would be
10 available to post-conviction counsel within 7 days of judgment. Post-conviction
11 counsel would begin his or her investigation immediately, and it would proceed
12 concurrently with the preparation of the record on appeal, thereby eliminating a 6 to 9
13 month period (*see* Petition, at 3) in which no attorney is working on the case.
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17 While waiting for the record, post-conviction counsel would begin his or her
18 investigation and could accomplish significant tasks.¹ For example, he or she could
19 review and organize trial counsel’s file; interview trial counsel and other significant
20 witnesses; begin any necessary additional investigation into the defendant’s
21 background for mitigation purposes; begin compiling any records relating to the
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24 ¹ Post-conviction counsel would be waiting only on transcripts. All pleadings and minute entries
25 should be immediately available to counsel through trial counsel’s files, and those that are
26 unavailable could easily be obtained from superior court.
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1 defendant's social, medical, or mental-health history that appear not to have been
2 previously obtained; begin identifying and consulting with any necessary experts; and
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4 identify potential post-conviction claims.

5 Further, the proposed requirement that trial counsel make his or her file
6 available immediately also effectively eliminates the risk that the file, or portions
7 thereof, will be lost and counsel will have to spend time reconstructing it. The
8 availability of a complete file will, in turn, enable post-conviction counsel to conduct
9 a more focused and efficient investigation. Conducting the post-conviction
10 investigation immediately after trial substantially reduces the risk that witnesses will
11 move and have to be located or that evidence will be lost and have to be found,
12 circumstances that would result in significant delay under the current procedure.
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16 Once transcripts are prepared, post-conviction counsel, having completed a
17 substantial portion of his or her investigation, and likely already aware from trial
18 counsel about the events occurring at trial, can incorporate them into the post-
19 conviction petition in an expeditious manner. Appellate counsel - who would be
20 appointed at the same time as post-conviction counsel - can simultaneously review
21 the transcripts and record, identify record-based appellate claims, and draft the
22 opening brief. When the post-conviction proceeding is complete, appellate counsel
23 could quickly incorporate any post-conviction claims into the brief. Thus, the post-
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1 conviction proceeding and the preparation of the appellate brief would proceed, to
2 some extent, on a parallel course, thereby eliminating much of the current delay.
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4 **III. *The proposed rule change will not affect a defendant's ability to***
5 ***bring claims of ineffective assistance of appellate counsel because a***
6 ***defendant may still raise such claims in federal court.***

7 Concerns about a defendant's ability to raise ineffective assistance of appellate
8 counsel claims are misplaced and do not justify denying the proposed amendments.
9 (See Comment by Criminal Practice and Procedure, Defense Sub-Committee.) To be
10 sure, the proposed amended rules do not provide a vehicle for challenging appellate
11 counsel's effectiveness in state court, but this omission does not leave a defendant
12 without a remedy: he or she may simply present his ineffective assistance of appellate
13 counsel claims in federal habeas corpus proceedings. This procedure disadvantages
14 only the State because, faced with the absence of state court adjudications to which to
15 defer, the federal courts will review the claims *de novo*. See generally 28 U.S.C. §
16 2254(d)(2). The claims will not be procedurally defaulted in federal court because
17 there exists no state court vehicle to raise them. See 28 U.S.C. § 2254(b)(1)(B)(i).
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21 **IV. *Conclusion.***

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23 APAAC strongly supports the proposed amendments to Rules 31.2, 31.4,
24 31.13, 32.4, and 32.9 of the Arizona Rules of Criminal Procedure. The proposed
25 amendments will change Arizona's capital post-conviction relief procedure for the
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1 better. They will reduce delay and further the victim's and State's interest in finality,
2 while simultaneously facilitating the defendant's investigation and enhancing the
3 proceeding's reliability. For the reasons set forth above, this Court should grant the
4 proposed amendments.
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6 Respectfully submitted this 19th day of May, 2014.
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8 ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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