

1 **ARIZONA SUPREME COURT**

2  
3 PETITION TO AMEND RULES 31.2,  
4 31.4(a), 31.13(f), 32.4, and 32.9  
5 ARIZONA RULES OF CRIMINAL  
6 PROCEDURE

Supreme Court No. R-14-0010

**Amended Petition to Amend Rules  
31.2(a), 31.4(a), 31.13(f), 32.4, 32.6  
and 32.9, Ariz. R. Crim. P.**

7 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Petitioner  
8 respectfully requests that this Court amend Rules 31.2(a), 31.4(a), and 31.13(f), and  
9 32.4, 32.6 and 32.9 of the Arizona Rules of Criminal Procedure as applicable to  
10 capital cases. The text of the proposed amendments is contained in the attached  
11 Appendix.

12 **I. INTRODUCTION TO AMENDED PETITION.**

13 During the initial comment period, only the State Bar and the Federal Public  
14 Defender’s Office filed comments to Rule Petition 14-0010. Based on the two  
15 comments that were filed and some informal conversations with stakeholders, in  
16 addition to technical changes intended to clarify the automatic filing of notices and  
17 creation of the record, this amended petition includes the following substantive  
18 improvements: (1) clarifies that while the PCR counsel files the petition for review,  
19 it is consolidated with the appeal and the appellate attorney is responsible for the  
20 combined appeal, (2) extends the deadline for the filing of a capital PCR petition  
21 from nine months to 365 days after the record is completed, (3) in light of the  
22 additional time PCR counsel has to file a petition, imposes a higher standard for  
23 any extensions to file the PCR petition—extraordinary circumstances, and (4)  
24 provides a time limit of no more than 365 days after PCR briefing is complete for  
25 the entire PCR process to be completed.

26 As noted in the original petition, three types of review follow the imposition

1 of a death sentence: post-conviction relief, direct appeal, and habeas review in the  
2 federal courts. The direct appeal is based on the trial record. *See, e.g., State v.*  
3 *Shackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (appellate court will not  
4 consider “materials that are outside the record on appeal”). Federal habeas review  
5 is based essentially on the state-court record. *See* 28 U.S.C. § 2254; *Cullen v.*  
6 *Pinholster*, 563 U.S. \_\_\_, 131 S. Ct. 1388, 1398 (2011). Thus, the PCR proceeding  
7 is the only one of these three that permits the parties to create a new record. *See*  
8 *State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982) (“One of the  
9 purposes of Rule 32 is to furnish an evidentiary forum for the establishment of facts  
10 underlying a claim for relief, when such facts have not previously been established  
11 of record.”), *disapproved of on other grounds by State v. Spreitz*, 202 Ariz. 1, 39  
12 P.3d 525 (2002); *see also State v. Carriger*, 132 Ariz. 301, 305, 645 P.2d 816, 820  
13 (1982) (“One of the purposes of Rule 32 is to provide a record by which the  
14 defendant’s allegations and the court’s disposition of them may be reviewed by the  
15 appellate courts.”).

16 To ensure that the PCR proceeding is reliable as possible, it is essential to  
17 create a record as reasonably close in time as possible to the issues raised, the most  
18 common issue raised in post-conviction proceedings being allegations of trial  
19 counsel’s ineffectiveness. In cases where the defendant is not entitled to relief in  
20 either the PCR or direct appeal, the proposal’s reasonable time restrictions would  
21 allow most cases to proceed through the state court review in less than four years—  
22 a time period significantly shorter than the current practice, but similar to the  
23 practice between 1974 and July 2000. *See* Office of the Attorney General, Capital  
24 Case Commission, Final Report Exhibits 27 and 28 (Dec. 2002), *available at*  
25 <https://www.azag.gov/ccc/final-report>.

26 Since the rule petition was filed, some have argued that conducting the PCR

1 proceeding immediately after the trial removes from the process any time for  
2 reflection, suggesting that such a period is necessary for a reliable process.  
3 Assuming this statement is accurate, the amended rule proposal provides a  
4 reasonable period for reflection by permitting as long as a year to elapse after  
5 completion of the record before the PCR petition must be filed.

6 It has also been mentioned that PCR counsel will require completion of the  
7 record to provide “context” before counsel can begin the reinvestigation. Of  
8 course, possession of the trial record is essential to identify, narrow, and define  
9 certain claims. The revised petition filing deadline addresses this by providing an  
10 entire year *after* the trial record is available in which to investigate and prepare the  
11 petition. Moreover, before the trial record is available, PCR counsel will have trial  
12 counsel’s file, which normally includes, among other information, the law  
13 enforcement reports, all court filings and minute entries, pre-trial witness  
14 interviews, and expert reports. Certainly, this is enough information for counsel to  
15 at least begin a preliminary reinvestigation as suggested by the ABA Guidelines.  
16 *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in  
17 Death Penalty Cases (2003), Guideline 10.7, Investigation (“Counsel at every stage  
18 have an obligation to conduct thorough and independent investigations relating to  
19 the issues of both guilt and penalty.”); *id.* at commentary to Guideline 10.15.1,  
20 Duties of Post-Conviction Counsel (post-conviction counsel’s duties include  
21 reinvestigating the case, which means “examining the facts underlying the  
22 conviction and sentence, as well as such items as trial counsel’s performance,  
23 judicial bias or prosecutorial misconduct”).

24 Additionally, in terms of reliability, any claim of trial counsel’s  
25 ineffectiveness will be better assessed closer in time to the trial. In determining  
26 whether counsel’s performance fell below the Sixth Amendment’s requirements,

1 courts consider the reasonableness of the attorney's performance under prevailing  
2 professional norms while making an effort to eliminate "the distorting effects of  
3 hindsight." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). The reviewing  
4 court must "reconstruct the circumstances of counsel's challenged conduct," and  
5 evaluate the attorney's conduct given the attorney's perspective at the time. *Id.* at  
6 689. These requirements are easier met closer in time to the performance.  
7 Moreover, to obtain relief on an ineffective assistance claim, the defendant's must  
8 overcome the "strong presumption" that counsel's performance fell within the  
9 "wide range of reasonable professional assistance." *Id.* Surmounting this bar  
10 requires affirmative evidence: trial counsel's inability to recall why a certain action  
11 was taken is not enough. *See, e.g., Greiner v. Wells*, 417 F.3d 305, 326 (2nd Cir.  
12 2005) ("Time inevitably fogs the memory of busy attorneys. That inevitability does  
13 not reverse the *Strickland* presumption of effective performance. Without evidence  
14 that counsel's strategy arose from the vagaries of ignorance, inattention or  
15 ineptitude, *Strickland's* strong presumption must stand.") (quotations omitted);  
16 *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999) ("[W]here the record is  
17 incomplete or unclear about [counsel's] actions, we will presume that he did what  
18 he should have done, and that he exercised reasonable professional judgment.").

19 Indeed, PCR counsel have acknowledged that the longer after the crimes and  
20 the trial the PCR proceeding occurs, the more difficult the PCR investigation  
21 becomes:

22 Nearly 11 years have elapsed since the murders were committed  
23 in December of 1999. This makes gathering and reviewing the  
24 evidence, tracking down witnesses, and investigating and developing  
25 claims more of a challenge than it would otherwise be if the crimes  
26 were closer in time. There is inherent and obvious delay (owing to the  
length of time getting to trial, the length of the trial itself, and the time  
necessary to dispose of the direct appeal) between the crimes in

1 question and the appointment of PCR counsel in any capital case, but  
2 by any measure, the delay in [this case] has been extraordinary. For  
3 this reason, in addition to all the others, a two year extension of time to  
prepare the PCR petition is reasonable and necessary.

4 Defendant's Motion for Extension of Time to File Petition for Post-Conviction  
5 Relief, *State v. Garza*, Maricopa County Superior Court No. CR1999-017624 (filed  
6 Oct. 29, 2010). As PCR counsel's difficulties in conducting an investigation many  
7 years after the fact demonstrates, the proposed reform will improve the capital PCR  
8 system for all involved parties.

9 This Court has long cautioned the parties in a criminal case from using  
10 discovery processes for a mere fishing expedition. *See, e.g., State v. Hyde*, 186  
11 Ariz. 252, 268, 921 P.2d 655, 671 (1996); *State v. Kevil*, 111 Ariz. 240, 242, 527  
12 P.2d 285, 287 (1974); *State ex rel. Corbin v. Superior Court in and for Maricopa*  
13 *County*, 103 Ariz. 465, 468, 445 P.2d 441, 444 (1968). Thus, like a Civil  
14 Complaint, or a Criminal Charging Document, the Arizona Supreme Court requires  
15 the filing of a PCR petition prior to authorizing discovery. *Canion v. Cole*, 210  
16 Ariz. 598, ¶ 10, 115 P.3d 1261 (2005). This is because the PCR petition provides  
17 context in which to judge what discovery is necessary and reasonable. *Id.* Having  
18 access to the defense file immediately after the trial will permit PCR counsel to  
19 begin an investigation without the necessity of formal discovery by speaking with  
20 the trial attorneys, the client, and witnesses while their memories of the trial are  
21 fresh. Once the record on appeal is completed, the diligent PCR attorney should be  
22 able to frame the issues for the PCR petition that require further discovery. When  
23 the PCR petition is filed with the judge who presided over the trial, the judge will  
24 be in an excellent position to make informed rulings concerning formal discovery  
25 given the judge's familiarity with what occurred recently at trial. Under the current  
26 system, when all the capital PCR cases are assigned pre-petition to a judge who did

1 not preside over the trial, the court is handicapped in making what are essentially  
2 discovery decisions.

3         Additionally, the amended petition includes a time limit of 365 days after the  
4 completion of PCR briefing, or 60 days after the evidentiary hearing, for the trial  
5 court to issue a final determination on the merits. This provision is intended to  
6 ensure that post-petition discovery and any evidentiary hearing occur within a  
7 reasonable time, and to address one of the primary reasons for which this Court  
8 previously found a pre-direct appeal PCR system unworkable, namely, the lack of  
9 any time limits. *See Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d 1149, 1151  
10 (1995) (prior practice resulted “in long delays”). This proposal’s time limits for  
11 filing the PCR petition and final resolution of all claims will prevent such delays.  
12 The revised petition provides the same time limit as the current rule for filing a  
13 petition for review from the denial of post-conviction relief—thirty days. In  
14 addition, the revised petition sets the due date for the opening brief at 60 days from  
15 the filing of the petition for review. This additional 60 days is intended to allow  
16 appellate counsel time to review the post-conviction proceeding record and include  
17 in the opening brief any additional, record-based post-conviction issues.

## 18 **II. RESPONSE TO COMMENT OF THE STATE BAR OF ARIZONA.**

19         The State Bar opposes the proposed reform primarily because it “would  
20 defeat the defendant’s long-standing constitutional right to raise an ineffective-  
21 assistance-of-appellate-counsel claim.” (Cmt. at 1.) The State Bar also notes the  
22 “unworkable” language from *State v. Spreitz*, 202 Ariz. 1, ¶ 6, 39 P.3d 525 (2002),  
23 language that refers to a dissimilar procedure where years ago the Arizona appellate  
24 courts would stay the direct appeal to allow the appellant an opportunity to file PCR  
25 proceedings in the trial court. Unlike the proposed reform, that prior procedure had  
26 no deadlines, applied to all appellate cases, and risked precluding claims from

1 review. *See id.* at ¶¶ 7-8; *Krone*, 181 Ariz. at 366, 890 P.2d at 1151.

2 **A. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.**

3 There is no question that a criminal defendant has a constitutional right to be  
4 represented by counsel on appeal, *Douglas v. California*, 372 U.S. 353 (1963), and  
5 a due process right to effective assistance of counsel during the first direct appeal.  
6 *Evitts v. Lucey*, 469 U.S. 387 (1985). The State Bar contends that the proposed  
7 reform is unconstitutional because it provides no mechanism to raise a claim of  
8 appellate counsel’s ineffective-assistance (“IAC”) in state court. It is true that  
9 under the proposed reform there is no mechanism for raising appellate IAC claims  
10 in state court since such claims are raisable only in the first PCR proceeding, which  
11 would occur before the direct appeal. *See* Ariz. R. Crim. P. 32.1, 32.2. But the  
12 State Bar is incorrect in arguing this creates a constitutional infirmity. There is no  
13 constitutional right to counsel in a post-conviction proceeding. *Pennsylvania v.*  
14 *Findley*, 481 U.S. 551, 554 (1987); *cf. Martinez v. Ryan*, \_\_ U.S. \_\_, 132 S. Ct.  
15 1309, 1319–20 (2012) (providing for an equitable, not constitutional, right to raise  
16 claim that post-conviction counsel was ineffective to prove cause and prejudice in  
17 habeas proceedings).

18 The State Bar is also mistaken that the inability to raise an appellate IAC  
19 claim in state court would preclude such a claim being raised in a federal habeas  
20 proceeding. Rather, the opposite is true. Because under the proposed reform  
21 Arizona would not provide a mechanism or “corrective process” for raising the  
22 appellate IAC claim in state court, such claims are entitled to de novo review in  
23 federal court. *See* 28 U.S.C. § 2254(b)(1)(B) (permitting habeas corpus relief  
24 where “there is an absence of available State corrective process”); *cf. Medley v.*  
25 *Runnels*, 506 F.3d 857 (9th Cir. 2007) (recognizing that the state prisoner did not  
26 raise any of the exceptions to the exhaustion requirement). Thus, because the

1 Arizona capital prisoner falls within an exception to the federal exhaustion  
2 requirement, the prisoner may raise appellate IAC claims in federal court and is  
3 able to avoid the extremely high deference required by 28 U.S.C. § 2254(d) for  
4 state-court merit decisions on federal habeas review. *See Felkner v. Jackson*, 562  
5 U.S. \_\_\_, 131 S. Ct. 1305, 1307 (2011) (*per curiam*).

6 **B. DELAY IN APPOINTMENT OF PCR COUNSEL.**

7 Part of the current delay in the capital PCRs is the willingness of qualified  
8 counsel to serve as counsel in a capital PCR. The State Bar is correct that the  
9 reform proposal does not address this aspect of capital PCR delay.

10 **C. FADING MEMORIES AND LOST FILES.**

11 The State Bar does not challenge the general proposition that to avoid the risk  
12 of fading memories and lost evidence, it is better to make a record of the events  
13 close in time. In fact, the State Bar expressly notes various Arizona provisions that  
14 are designed to maintain record-evidence. However, the evidence this reform is  
15 designed to capture is evidence that is *not of record* under the current system until  
16 years after the relevant event. *See State v. Bell*, 23 Ariz.App. 169, 171, 531 P.2d  
17 545, 547 (1975) (“Rule 32 has at its aim the establishment of proceedings to  
18 determine the facts underlying a defendant’s claim for relief when such facts are not  
19 otherwise available.”). The most important is evidence related to the common  
20 claim in capital cases that the trial attorneys were constitutionally ineffective.  
21 Under the current system, trial attorneys, when interviewed or testifying many years  
22 after the trial, often cannot remember specific reasons for why they did or did not  
23 do something. Even their files which were originally given to the appellate attorney  
24 are sometimes incomplete when provided to PCR counsel. The obvious advantage  
25 of creating a PCR record closer in time to the event—here the trial—decreases the  
26 risks of lost and faded evidence experienced under the current system. The

1 advantages of this more reliable record outweigh the disadvantages of not being  
2 able to litigate an appellate IAC claim in state court and of extending the period of  
3 time the case is not final and thus can be affected by new rules of constitutional law.

### 4 **III. RESPONSE TO COMMENT OF THE FEDERAL PUBLIC** 5 **DEFENDER.**

6 Generally, the Federal Public Defender (“FPD”) opposes the proposed reform  
7 on the grounds that the amendments will increase rather than decrease the  
8 complexity, costs, and delays of capital review. The FPD is mistaken when it  
9 complains that the proposed reform will elevate speed over accuracy; rather, the  
10 proposed reforms will increase the accuracy and reliability of the proceedings, with  
11 the side-effect of reducing delay.

#### 12 **A. THE ASSERTION THAT THE PROPOSAL DOES NOT ADDRESS IDENTIFIED** 13 **PROBLEMS IN THE CURRENT SYSTEM OF REVIEW FOR CAPITAL CASES.**

##### 14 **1. *Unitary review.***

15 The FPD argues that a unitary review system was previously tried and found  
16 unworkable by the Arizona courts. However, the proposed reform is not the same  
17 as that prior system. The prior system applied to all criminal cases and had no  
18 deadlines imposed by the Rules of Criminal Procedure. Additionally, the stay of the  
19 appeal was granted based on specific limited grounds; thus, because the focus was  
20 not on a complete postconviction relief review, potentially meritorious claims were  
21 precluded. *See Spreitz*, 202 Ariz. at 2–3, ¶¶ 7-8, 39 P.2d at 526–27 (discussing the  
22 problem of claims inadvertently being precluded); *Krone*, 181 Ariz. at 366, 890 P.2d  
23 at 1151 (discussing the problem of long delays in stayed cases as well as the  
24 preclusion problem). But notwithstanding these problems, this Court recognized  
25 that an early PCR proceeding “could make consideration of the direct appeal moot  
26 and could hasten the start of a new trial or other resolution of the case.” *Krone*, 181

1 Ariz. at 366, 890 P.2d at 1151.

2 While recognizing the potential benefit of an earlier PCR proceeding, the  
3 proposed reform addresses the problems that made the prior practice unworkable.  
4 First, the change is limited to capital cases. Second, the proposal provides an  
5 adequate time frame in which to fully investigate and litigate all available Rule 32.1  
6 claims. Third, the proposed Rule imposes reasonable time limits to assure that  
7 cases are not lost in the system as under the prior unitary regime—the revised  
8 proposal gives petitioners one year after completion of the record to file a petition,  
9 imposes a higher bar on extensions, and requires the PCR proceeding to be  
10 completed no greater than one year after briefing is complete.

11 **2. *The proposed reform does not solve all delay.***

12 The FPD, citing to its Appendix A, points out that although the original  
13 petition noted an average delay of 3 years between the denial of certiorari on direct  
14 review and the filing of a PCR petition, the order of the proceedings is not the sole  
15 source of PCR delay. The FPD is correct that the proposal will not eliminate all  
16 sources of unnecessary delay, but its argument illuminates several important points.  
17 Under the existing system, it is in reality a much longer period than an average of  
18 three years before a capital petitioner has the opportunity to create a record of trial  
19 counsel's performance. So even if the proposal did not reduce the time between the  
20 end of direct appeal and the PCR petition, it would drastically reduce the time  
21 between the conclusion of *trial* and the PCR petition.

22 The FPD's argument also identifies another source of delay that would be  
23 eliminated by the proposed reform—the delay in filing the Opening Brief in the  
24 direct appeal. Under the reform, unlike the current system, there would be little  
25 reason for an extension of time, as appellate counsel will receive the record on  
26 appeal and transcripts while the PCR is pending.

1           In its computation of the time a case is on appeal, the FPD’s Appendix A  
2 includes the time necessary to prepare the record on appeal and the transcripts as  
3 well as the time it takes to complete the briefing. Focusing instead on just the time  
4 between the filing of the Reply Brief and the date of the Arizona Supreme Court’s  
5 opinion in the ten cases that were used as an example, the time is rarely more than 1  
6 year, and is often much less: *Andriano* (3 months, 25 days); *Boggs* (10 months, 26  
7 days); *Carreon* (11 months, 27 days); *Chappell* (12 months); *Cruz* (7 months, 25  
8 days); *Garza* (12 months, 27 days); *Hampton* (12 months, 20 days); *Johnson* (12  
9 months, 19 days); *McCray* (4 months, 26 days); *McGill* (5 months, 5 days); *Moore*  
10 (3 months, 8 days); *Sansing* (first case 9 months, 14 days); *Tucker* (7 months, 2  
11 days); *Velazquez* (2 months, 30 days).

12           This difference in time it took the Arizona Supreme Court to resolve the  
13 direct appeal demonstrates an obvious fact—that all cases are not the same and all  
14 cases do not demand the same amount of time and resources. Obviously, the issues  
15 are fewer in a case where the evidence of guilt is overwhelming or where, for  
16 example, the defendant has pled guilty. The time limits in the proposal are thus  
17 phrased, “not later than,” to account for those cases that may not require the fully  
18 permitted amount of time.

19                           **3.     *PCR investigation.***

20           The FPD misunderstands the proposal concerning the opportunity for  
21 investigation. In a capital case, the claim most often and consistently raised in post-  
22 conviction review is that trial counsel was constitutionally ineffective. Under the  
23 current system, years pass before any record can be made on this issue and, as a  
24 result, trial counsel often lacks a detailed memory of the relevant events. Under  
25 such circumstances, there is no way for a defendant to overcome the strong  
26 presumption that counsel performed competently. *See Strickland*, 466 U.S. at 689;

1 *Gretzler v. Stewart*, 112 F.3d 992, 1003 (9th Cir. 1997); *Greiner*, 417 F.3d 305, at  
2 326. Creating a record near in time to the events therefore makes the proceedings  
3 more reliable.

4 Furthermore, the slightly revised proposal provides even more time for pre-  
5 petition investigation than afforded under the 2013 version of Rule 32.4 and  
6 significantly more than under the 1992 version of the Rule. And, despite the FPD's  
7 contrary assertions, the proposed reform does not tell PCR counsel how to  
8 investigate. *See Strickland*, 466 U.S. at 689 (recognizing counsel's constitutionally  
9 protected independence). Rather it allows for any investigation to begin  
10 immediately, when PCR counsel obtains the defense trial files that will include law  
11 enforcement reports and pre-trial interviews and has access to the client. The  
12 opportunity to begin an investigation so close in time to the trial avoids the problem  
13 of fading memories and missing evidence not in the custody of the court or law  
14 enforcement.

#### 15 **4. *Problems with appointment and performance of counsel.***

16 Based somewhat on experiences in Idaho and Colorado, the FPD contends  
17 that more highly qualified attorneys would be required under the proposed Rule  
18 change. The FPD does not explain why. Currently, separate counsel are appointed  
19 for trial, appeal, and PCR proceedings. That remains unchanged. While in the past  
20 there has been a problem in securing PCR counsel, the reform does not purport to  
21 address that issue.

22 The FPD is mistaken about the Sixth Amendment and the different  
23 requirements for appellate and postconviction counsel. The Sixth Amendment  
24 applies only to trial counsel, because it is limited to trial rights. *See Strickland*, 466  
25 U.S. at 684-87 (discussing the Sixth Amendment basis for resolving whether  
26 counsel's performance was so wrong that the attorney was not functioning as

1 guaranteed counsel under the Sixth Amendment). Although the Supreme Court has  
2 extended the *Strickland* remedy to direct appeal,– see *Smith v. Robbins*, 528 U.S.  
3 259, 284-89(2000); *Smith v. Murray*, 477 U.S. 527, 535 (1986), it has never  
4 recognized a constitutional right to effective assistance of counsel in any collateral  
5 proceeding. See *Martinez v. Ryan*, 132 S. Ct. at 1319; *Coleman v. Thompson*, 501  
6 U.S. 722, 753-54 (1991).

7 Additionally, while this Court has amended Criminal Procedure Rule 6.8(c)  
8 to provide different criteria for appellate and PCR counsel, the Rule has not always  
9 had such requirements. See, e.g., *Spears v. Stewart*, 267 F.3d 1026, 1033 (9th Cir.  
10 2001) *opinion amended and superseded by Spears v. Stewart*, 267 F.3d 1026 (9th  
11 Cir. 2002). And *Strickland* imposes no such requirement.

12 The FPD contends that, because the petition for review from the denial of  
13 any PCR proceeding would be consolidated with the appeal, appellate counsel  
14 would be unqualified to investigate the performance of the trial and PCR attorneys.  
15 Yet, under the proposal, appellate counsel simply would provide the same type of  
16 legal analysis any appellate attorney performs based on the record before the  
17 appellate court. The FPD further argues that this arrangement would “require this  
18 Court to provide and ensure the Sixth and Fourteenth Amendment effectiveness of  
19 PCR and petition for review counsel.” (Cmt. at 9.) However, the change in the  
20 order of the proceedings does not convert the collateral PCR proceeding into a  
21 phase of trial. Like the United States Supreme Court, Arizona has not recognized  
22 any constitutional right to effective assistance of PCR counsel, see, e.g., *State v.*  
23 *Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996), or to collateral review  
24 itself. Of course, defendants would be free to argue otherwise. Although the  
25 petition for review would be consolidated with the appeal, this Court would retain  
26 the power to decline review of those issues, much like the Ninth Circuit does not

1 always decide the uncertified claims which it permits an appellant to brief. *See,*  
2 *e.g., Lopez v. Schriro*, 491 F.3d 1029, 1039 (9th Cir. 2007). Contrary to the FPD’s  
3 position, the reform should not lead to “litigating the qualifications and  
4 effectiveness of an increased number of counsel,” but rather the entire  
5 postconviction relief and direct appeal in state court should be completed in most  
6 cases within approximately three years.

7 **5. Existing Criminal Procedure Rule 6.3(d) and (e).**

8 The FPD is correct that Criminal Procedure Rule 6.3(d) and (e) were  
9 specifically designed to maintain files in capital cases and reduce delay. However,  
10 these rules have not always been successful in ensuring that trial files remain intact.  
11 And the FPD’s suggestion of a central repository was rejected by the defense bar at  
12 the time Rules 6.3(d) and (e) were proposed. *See* M. Lieberman and J. Belanger,  
13 Supplemental to Capital Case Task Force Report, Appendix D to Arizona Supreme  
14 Court Capital Case Task Force (September 2007),  
15 <http://www.azcourts.gov/Portals/74/CCTF/FinalRpt092007.pdf> (last visited April  
16 29, 2014).

17 In footnote 2, the FPD speculates about the reliability of witnesses’  
18 memories. But it cannot be seriously disputed that as a general matter witnesses’  
19 memories are more reliable closer to the event. *See, e.g., Blackburn v. Thomas*, 450  
20 U.S. 953, 956 n.3 (1981) (“Witnesses disappear and memories fade with the  
21 passage of time.”); *Logerquist v. Danforth*, 188 Ariz. 16, 22, 932 P.2d 281, 287  
22 (App. 1996) (recognizing “potential evidentiary problems” caused by passage of  
23 time, including that “witnesses may no longer be available; and evidence becomes  
24 less trustworthy because memories fade or are affected by intervening events and  
25 experiences”). In the case of trial witnesses, under the current system years will  
26 have passed between the crimes and the postconviction relief proceeding. In the

1 case of trial counsel, it is important to assess performance close in time to the trial  
2 to avoid applying the wrong prevailing professional norms that change over time, to  
3 avoid applying hindsight, and to better equip defendants to develop evidence that  
4 may overcome the presumption of adequate performance. *See Strickland*, 466 U.S.  
5 at 688-89.

6 The FPD also discounts the advantage of having the same judge preside over  
7 the trial and sentencing and PCR. While there is no doubt that occasions may arise  
8 when the trial judge will be unavailable a year after the verdict, that likelihood only  
9 increases with the passage of time. Having witnessed the trial, the trial judge is in  
10 the best position to address pre-petition issues that may arise, as well as to  
11 adjudicate PCR claims and discovery requests.

#### 12 **6. *Reliability in capital cases.***

13 The FPD further asserts that being required to begin investigating without the  
14 record on appeal and transcripts, and then having only 270 days (about 9 months)  
15 *after* the record and transcripts are filed will result in a less reliable system. First,  
16 under the amended proposal, PCR counsel has a full year after completion of the  
17 record on appeal to file the petition. Second, before that year begins to run, PCR  
18 counsel will have immediate access not only to the client, but also to trial counsel's  
19 file, which reduces the risk of lost files. Finally, given the length of time it takes to  
20 complete the record (currently around 3 months), there will be no significant  
21 reduction in time in which to file a PCR petition from the current system.

#### 22 **B. SIMILAR SYSTEMS IN OTHER STATES.**

23 Pointing primarily to Colorado and Idaho, the FPD warns that other  
24 jurisdictions that have tried a unitary review system have waded into a quagmire.  
25 Of course, how well a system works is often a function of how well its rules and  
26 structures are enforced. In examining those jurisdictions and the cases cited by the

1 FPD it is clear that the issues are not so drastic.

2 In 1997, Colorado enacted the Unitary Review Scheme for capital cases to  
3 expedite post-sentencing litigation by eliminating “unreasonable and unjust delays.”  
4 *Owens (I) v. Office of Dist. Attorney for Eighteenth Judicial Dist.*, 896 F. Supp. 2d  
5 1003, 1006 (D. Colo. 2012). In *People v. Owens (II)*, 228 P.3d 969 (Colo. 2010),  
6 Colorado’s Supreme Court explained that the legislature had enacted a unitary  
7 system of review for capital cases that required completion of postconviction  
8 review, certification of the record, and appellate briefing within two years from the  
9 date the sentence of death is imposed. *Id.* at 970, C.R.S. 16-12-208(3). In the  
10 *Owens* case, given the “unprecedented size of the record, numerous ongoing delays  
11 in making the record available to counsel, and substantial delays in getting conflict-  
12 free counsel appointed,” there was a possibility of a request for extension of time  
13 beyond the two-year limit. *Id.* at 970. The Colorado Supreme Court held that a  
14 trial court was permitted to grant extensions of time, “necessitated by extraordinary  
15 circumstances that could not have been foreseen and prevented,” under the Rules  
16 the Court promulgated to implement the legislature’s policy goals. *Id.* at 973.  
17 Under the proposed reform here, the time limits start to run only after the trial  
18 record is complete and extensions may be granted upon a showing of extraordinary  
19 circumstances.

20 In *Owens II*, after PCR counsel announced the intent to raise IAC claims,  
21 thereby waiving attorney-client privilege, direct appeal counsel initiated a lawsuit to  
22 prevent PCR counsel’s disclosure of privilege materials to the State without direct  
23 appeal\_ counsel’s approval. 896 F. Supp. 2d at 1009. Former trial counsel filed a  
24 similar lawsuit. *Id.* Appellate counsel claimed that the disclosure of privilege  
25 information to the State would harm the direct appeal and thus created some sort of  
26 conflict between PCR and appellate counsel. Appellate counsel, however, could not

1 articulate for the federal court how this situation created a conflict. *Id.* at 1014. In  
2 any event, the district court found that trial counsel had no standing and that federal  
3 abstention required dismissal of the lawsuits. *Id.* at 1017; *see also Younger v.*  
4 *Harris*, 401 U.S. 37 (1971). Contrary to the FPD’s position, Colorado’s unitary  
5 review system did not create “complex and time-consuming problems”; rather, as  
6 the *Owens* cases suggest, the heart of any problem is with the administration of the  
7 system that permits unnecessary delay due to attorneys raising specious issues.

8 In 1984, the Idaho Legislature enacted a unitary system of review for capital  
9 case to eliminate “unnecessary delay in carrying out a valid death sentence.”  
10 *Hoffman v. Arave*, 236 F.3d 523, 532 (9th Cir. 2001) (quoting Idaho Code § 19-  
11 2719). “The statute requires a capital defendant, within *forty-two days* of the entry  
12 of the judgment imposing the death penalty, to ‘file any legal or factual challenge to  
13 the sentence or conviction that is known or reasonably should be known.’” *Id.*  
14 (quoting Idaho Code § 19-2719(3)) (emphasis added). In Hoffman’s case, the same  
15 counsel represented him at trial, in post-conviction proceedings, and on direct  
16 appeal. *Id.* at 528. Following the combined direct appeal, Hoffman filed a second  
17 PCR petition where he was represented by new attorneys who filed ineffective-  
18 assistance claims for trial, PCR, and appellate counsel, but long after the strict 42-  
19 day limit. The state court found the claims procedurally defaulted, but the federal  
20 court on habeas review found the state-bar inadequate because of the short time  
21 period, including the fact that the trial record was completed *after* the 42 days had  
22 expired. *Id.* at 532-35. Thus, the ineffective assistance claims were reviewed in  
23 federal court. Significantly, the Court noted that, after Hoffman’s case, Idaho  
24 revised its procedure to allow for more time and for the appointment of different  
25 counsel. *Id.* at 534. This case does not identify any problem relevant to the  
26 proposed Arizona reform.

1           Finally, in Appendix B, the FPD discusses four Idaho cases: Timothy  
2 Dunlap, Darrell Payne, Dale Shackelford, and Donald Fetterly. In all four cases,  
3 the defendants received the benefit of the holding in *Ring v. Arizona*, 536 U.S. 584  
4 (2002), because due to the fact that direct review commenced only after the post-  
5 conviction proceedings, the cases had not become final when *Ring* was decided and  
6 the defendants were entitled to a new sentencing at which jurors had to find the  
7 aggravating circumstances. This is a trade-off under the proposed reform. In return  
8 for a more reliable, complete record and a more timely proceeding, the defendant  
9 will get the benefit of any substantial change in the law that affects his case before  
10 completion of direct appeal makes the judgment final.

11           **C. THE PROPOSED AMENDMENTS DO NOT LIMIT PROTECTIONS FOR**  
12           **CAPITAL DEFENDANTS.**

13           There is no question that the right “to effective assistance of counsel *at trial*  
14 is a bedrock principle in our justice system,” and “the foundation for our adversary  
15 system.” *Martinez*, 132 S. Ct. at 1317 (emphasis added). Under the proposed rule,  
16 a record is created relatively close in time to the trial to assess any claims of  
17 ineffective assistance of trial counsel—as well as other PCR claims—and those  
18 allegations and record are available to this Court to review as part of the direct  
19 appeal. Thus, the claims are no longer outside the framework where counsel is  
20 guaranteed; but rather these claims get the same treatment as any other record-  
21 based claim presented by appellate counsel, counsel that is guaranteed by the  
22 Constitution.

23           This proposed reform combines the benefit of the sound reasons for deferring  
24 consideration of ineffective-assistance-of-trial claims until the collateral review  
25 stage—the opportunity to create a record beyond that of the trial—with the benefit  
26 of having PCR claims, including claims of trial counsel’s alleged ineffectiveness,

1 treated as any other legal claims in a direct appeal. If appellate counsel's  
2 performance is constitutionally ineffective, there is a remedy in federal court.

3 Whether this reform eliminates the opportunity to challenge the effectiveness  
4 of PCR attorneys in federal court is not significant. The holding of *Martinez* only  
5 applies if a trial counsel IAC claim was procedurally defaulted in state-court and  
6 the state prisoner could demonstrate that PCR counsel was *Strickland* incompetent  
7 for failing to raise it. Under the proposed system, appellate counsel's effectiveness  
8 can be attacked directly in federal court without having to surmount any procedural  
9 bar. Furthermore, regardless of *Martinez*, the postconviction record will be timely  
10 developed and the overall postconviction state process should rarely take more than  
11 about three years.

12 **D. COSTS OF CAPITAL CASES.**

13 The longer litigation takes, the greater the costs. Criminal Procedure Rule  
14 32.1(a) provides an avenue for relief if the "conviction or the sentence was in  
15 violation of the Constitution of the United States or of the State of Arizona." The  
16 claim in the initial PCR proceeding is only precluded if it is "[r]aisable on direct  
17 appeal under Rule 31 or on post-trial motion under Rule 24." Ariz. R. Crim. P.  
18 32.2(a)(1). It is difficult to image a claim that is available under Rule 32.1(a) where  
19 relief was assured, yet a trial court would determine it was precluded and therefore  
20 not order relief. Even if, after conclusion of the PCR proceeding, a case were  
21 reversed on direct appeal and remanded for a new trial or new sentencing, it is not  
22 the case that the work done during the PCR proceeding would be for naught.  
23 Rather, under such circumstances, it is likely that PCR counsel uncovered  
24 information that would be relevant for the resentencing or retrial. Consequently,  
25 the FPD's assertion of increased costs is not a compelling argument against the  
26 proposed reform.

1 **CONCLUSION**

2 Petitioner respectfully requests that the Court amend Rules 31.2, 31.4(a), and  
3 31.13(f), and Rules 32.4 and 32.9 of the Arizona Rules of Criminal Procedure as  
4 proposed herein.

5 Respectfully submitted,

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8 /s/ \_\_\_\_\_

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