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ARIZONA SUPREME COURT

In the Matter of,

PETITION TO AMEND RULES
31.2, 31.4, 31.13, 32.4, and 32.9
ARIZONA RULES OF CRIMINAL
PROCEDURE

SUPREME COURT NO. R- _____

**PETITION TO AMEND RULES 31.2, 31.4,
31.13, 32.4, AND 32.9, ARIZ. R. CRIM. P.**

**[MODIFIED COMMENT PERIOD
REQUESTED]**

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Petitioner respectfully requests that this Court amend Rules 31.2, 31.4, and 31.13, and Rules 32.4 and 32.9 of the Arizona Rules of Criminal Procedure as applicable to capital cases. Petitioner requests a modified comment period to allow for an amended petition, if appropriate, after an initial comment period. The text of the proposed amendments is contained in the attached Appendix.

INTRODUCTION

Under Arizona's current capital post-conviction procedure, post-conviction relief proceedings do not commence until after the conclusion of direct review. In

capital cases, significant delay is routine and post-conviction proceedings occur many years after trial. The delay between the trial and the post-conviction proceeding can potentially affect the reliability of the capital post-conviction proceeding. Moreover, post-conviction counsel are placed at a disadvantage because the delay leads to the loss of trial counsel's files and records, unavailability of witnesses, and difficulty obtaining evidence. In turn, this leads to a perceived need to re-investigate the case anew in the post-conviction setting.

This petition explains the consequent need to change the way that capital post-conviction cases are processed. These proposed amendments will remedy three serious problems in the way that courts currently address post-conviction claims in capital cases. The amendments will: (1) make the post-conviction review process more reliable by creating a state-court record close in time to the trial; (2) decrease the inordinate amount of delay in state-court review of capital cases; and (3) provide for direct review of ineffective assistance of trial counsel claims after an opportunity for an evidentiary hearing in the trial court. Under the proposed amendments to Rules 31 and 32, post-conviction proceedings occur immediately after trial, and this Court's review of those proceedings would be consolidated with direct review. This re-ordering would ensure a more reliable post-conviction proceeding for capital defendants and would reduce the delay in capital post-conviction proceedings.

I. BACKGROUND AND CURRENT RULE 32 PROCEDURES.

A. *Background.*

Rule 32 post-conviction relief proceedings allow criminal defendants to raise claims relating primarily to whether: (1) trial counsel provided effective representation; (2) there is "newly discovered" evidence that would have changed the verdict or sentence; and (3) there has been a change in the law that applies retroactively and would probably change the conviction or sentence. *See* Ariz. R.

Crim. P. 32.1. In capital cases especially, allegations of trial counsel’s ineffective assistance make up the most significant portion of claims raised in Rule 32 proceedings. Previously, this Court preferred to suspend the direct appeal while trial courts adjudicated claims of ineffective trial assistance under Rule 32. *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989). The trial court would rule on the ineffectiveness claim and permit the defendant to consolidate any petition for review from the post-conviction proceedings with the direct appeal. *Id.*

This Court eventually abandoned the practice of suspending direct appeal to litigate Rule 32 proceedings, finding the procedure unworkable. *Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d 1149, 1151 (1995); *see also State v. Spreitz*, 202 Ariz. 1, 2, ¶ 6, 39 P.3d 525, 526 (2002). Long delay was the primary reason for abandoning the former practice. *See Krone*, 181 Ariz. at 366, 890 P.2d at 1151 (citing *State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994), where 5 years elapsed from conviction to disposition on appeal).

B. *Delay in the current capital post-conviction procedure.*

The current procedure for adjudicating direct appeals and Rule 32 proceedings in capital cases has proven just as unworkable as the prior procedure, if not more so. Under the current system, direct review proceedings initiate automatically upon imposition of a death sentence. Ariz. R. Crim. P. Rule 31.2(b). The capital appellant is then allowed 90 days after completion of the record on appeal—which typically takes 6 to 9 months—to file an opening brief. Ariz. R. Crim. P. 31.13(f). Then, the State files an answering brief, the defendant files a reply brief, this Court conducts oral argument, and direct review concludes with an opinion.

Capital defendants initiate Rule 32 post-conviction relief (PCR) proceedings after the convictions and death sentences are affirmed on direct appeal. Ariz. R. Crim. P. 32.4(a); *Spreitz*, 202 Ariz. at 2, ¶ 6, 39 P.3d at 526. But in recent years,

many cases see significant delays both in (a) the appointment of post-conviction counsel, and (b) the time that elapses (frequently more than a year) from the appointment of post-conviction counsel to the filing of a PCR petition. On average, more than 3 years pass between the time that the United States Supreme Court denies review of the certiorari petition and the time that a capital Rule 32 petition is filed. Sometimes the delay is significantly longer:

- *State v. Steven Boggs*, Maricopa County Superior Court No. CR–2002–009759, 218 Ariz. 325, 185 P.3d 111 (2008)—amended Rule 32 petition filed 3 years and 8 months after United States Supreme Court denied certiorari on direct review;
- *State v. Derek Chappell*, Maricopa County Superior Court No. CR2004–037319, 225 Ariz. 229, 236 P.3d 1176 (2010)—Rule 32 petition filed 2 years and 5 months after cert. denied;
- *State v. John Montenegro Cruz*, Pima County Superior Court No. CR–2003–1740, 218 Ariz. 149, 181 P.3d 196 (2008)—Rule 32 petition filed 3 years after cert. denied;
- *State v. Ruben Myran Johnson*, Maricopa County Superior Court No. CR2001–001604, 212 Ariz. 425, 133 P.3d 735 (2006)—first amended petition filed 5 years and 9 months after cert. denied;
- *State v. Frank Dale McCray*, Maricopa County Superior Court No. CR2001–015915, 218 Ariz. 252, 183 P.3d 503 (2008)—supplemental petition filed 4 years and 8 months after cert. denied;
- *State v. Leroy Dean McGill*, Maricopa County Superior Court No. CR2003–005315, 213 Ariz. 147, 140 P.3d 930 (2006)—petition filed 3 years and 2 months after cert. denied;
- *State v. Julius Moore*, Maricopa County Superior Court No. CR1999–016742, 222 Ariz. 1, 213 P.3d 150 (2009)—no Rule 32 petition filed as of this date; cert. denied more than 4 years ago in November, 2009.
- *State v. John Edward Sansing*, Maricopa County Superior Court No. CR98–003520, 206 Ariz. 232, 77 P.3d 30 (2003)—petition filed 3 years and 7 months after cert. denied;

- *State v. Eugene Tucker*, Maricopa County Superior Court No. CR1999–015293, 215 Ariz. 298, 160 P.3d 177 (2007)—no Rule 32 petition yet filed; cert. denied over 6 years ago on October 1, 2007;
- *State v. Juan Velazquez*, Maricopa County Superior Court No. CR2001–014970, 216 Ariz. 300, 166 P.3d 91 (2007)—no Rule 32 petition yet filed; cert. denied more than 5 years ago on April 21, 2008.

The filing of a PCR petition merely begins the collateral review. After the petition is filed, motions to amend the petition, pre-hearing discovery, and preparation for evidentiary hearings typically require additional time.

As a result of these various delays, the typical post-conviction hearing in a capital case occurs years after the crime and the trial. For example, in many recent capital Rule 32 proceedings, evidentiary hearings and dispositive rulings have taken place roughly a decade after the crime and more than 7 years after trial, with even greater lapses of time in some cases:

- *State v. Wendi Andriano*, Maricopa County Superior Court No. CR2000–096032, 215 Ariz. 497, 161 P.3d 540 (2007)—PCR petition filed, currently pending evidentiary hearing 13 years after crime and 9 years after trial;
- *Boggs*, Maricopa County Superior Court No. CR–2002–009759, 218 Ariz. 325, 185 P.3d 111—Rule 32 petition dismissed without evidentiary hearing nearly 11 years after murders and almost 8 years after trial;
- *State v. Albert Carreon*, Maricopa County Superior Court No. CR2001–090195, 210 Ariz. 54, 107 P.3d 900 (2005)—PCR proceeding pending as of this date, more than 12 years after murder and 10 years after trial;
- *Cruz*, Pima County Superior Court No. CR–2003–1740, 218 Ariz. 149, 181 P.3d 196—Rule 32 petition filed nearly 9 years after murder and almost 7 years after trial;
- *State v. Ruben Garza*, Maricopa County Superior Court No. CR1999–017624, 216 Ariz. 56, 163 P.3d 1006 (2007)—PCR

petition dismissed without evidentiary hearing nearly 9 years after trial;

- *State v. Tracy Hampton*, Maricopa County Superior Court No. CR2001–008991, 213 Ariz. 167, 140 P.3d 950 (2006)—PCR evidentiary hearing conducted more than 10 years after *Ring*¹ resentencing proceeding;
- *Johnson*, Maricopa County Superior Court No. CR2001–001604, 212 Ariz. 425, 133 P.3d 735—Rule 32 proceeding pending as of this date, more than 13 years after murder and 10 years after trial;
- *McCray*, Maricopa County Superior Court No. CR2001–015915, 218 Ariz. 252, 183 P.3d 503—PCR proceeding pending as of this date, more than 8 years after trial;
- *McGill*, Maricopa County Superior Court No. CR2003–005315, 213 Ariz. 147, 140 P.3d 930—Rule 32 evidentiary hearing conducted 9 years after murder and 7 years after trial;
- *Sansing*, Maricopa County Superior Court No. CR98–003520, 206 Ariz. 232, 77 P.3d 30—Rule 32 evidentiary hearing conducted nearly 12 years after murder and more than 10 years after sentencing hearing.

This significant time lapse is problematic for two reasons: (1) it amplifies the potential for lost evidence and fading witness memory, and (2) it fosters an unnecessary need to re-investigate the case anew. *See State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984) (“Rule 32 petitions are often filed, as in this case, years after the trial. When the appeal is filed, the witness’s memories and evidence are fresh and readily available should a new trial be required. When a Rule 32 petition is filed, the witness’s testimony may be lost because of dimmed memories or death and physical evidence may be lost, destroyed, or misplaced.”); *cf. Krone*, 181 Ariz. at 366, 890 P.3d at 1151 (“an early Rule 32 proceeding could

¹ *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002).

make consideration of the direct appeal moot and could hasten the start of a new trial or other resolution of the case”).

II. THE PROPOSED AMENDMENTS.

The proposed amendments would re-order the proceedings so that post-conviction review in capital cases would take place immediately after trial, followed by the direct appeal. Upon the entry of judgment following the imposition of a death sentence, the clerk would simultaneously file a notice of appeal and notice of post-conviction relief on the defendant’s behalf. In addition, within 7 days of entry of judgment, trial counsel must file a notice with the superior court indicating that a copy of counsel’s complete trial file is available for appointed post-conviction and appellate counsel.

Appointed post-conviction counsel will then have 270 days from the notice of the completion of the record on appeal to file a petition for post-conviction relief. The direct appeal will be automatically stayed pending the superior court’s decision on the petition for post-conviction relief.

Appointed appellate counsel will have 90 days after the superior court issues a decision in the post-conviction relief proceeding to file an opening brief in the Arizona Supreme Court. The opening brief will be consolidated with any petition for review from the denial of post-conviction relief.

Petitioner anticipates a prospective application of these amended rules. If the amendments were approved, the new provisions would apply to those cases in which capital sentences were imposed after the effective date.

III. REASONS FOR IMPLEMENTING THE AMENDMENTS.

A. *The amendments will improve the reliability of post-conviction proceedings.*

Evidence-based claims—such as ineffective assistance of counsel, which make up a significant amount of Rule 32 claims—should be addressed as close in time as possible to the crime and the trial. It is critically important to discover any

constitutionally deficient aspect of counsel’s performance before witnesses’ memories have faded and before evidence becomes stale or is “lost, destroyed, or misplaced.” *See Carriger*, 143 Ariz. at 146, 692 P.2d at 995. Accordingly, any investigation into trial counsel’s performance should precede the direct appeal, which addresses record-based legal issues. In contrast, potential claims of ineffective assistance of counsel, which under Arizona law must be raised in the post-conviction relief proceeding, *Spreitz*, 202 Ariz. at 3, ¶ 9, 39 P.3d at 527, usually depend on extra-record evidence and are vulnerable to fading memories and loss or destruction of evidence. By moving the extra-record based claims forward, in some instances by several years, the proposed amendments will significantly improve the reliability of the fact-finding upon which many capital post-conviction claims depend.

B. *The amendments will reduce delay.*

The amendments will also reduce the time between imposition of a death sentence and the conclusion of post-conviction and direct review. First, conducting the post-conviction proceedings immediately after trial will make investigation of claims dependent on extra-record evidence more efficient because the relevant evidence will be fresher and more readily available. Post-conviction counsel will have the advantage of developing potential issues immediately upon appointment.

In contrast, under the current approach, trial counsel’s file is often lost or misplaced in the years after trial and before post-conviction proceedings commence, impeding post-conviction counsel’s ability to effectively investigate potential claims. Commencing the Rule 32 proceedings directly after trial will remedy this common problem by allowing immediate transfer of trial counsel’s file to post-conviction counsel, who can then begin reviewing for potential claims even as the record on appeal is being compiled. The proposed amendments address this directly by instructing post-conviction counsel to begin investigating potential

claims immediately upon appointment, even before the record on appeal is complete.

C. *The amendments will improve judicial efficiency.*

Rule 32 proceedings are part of the original criminal action. Ariz. R. Crim. P. 32.3. By moving the post-conviction review of claims forward, the proposed amendments will increase the likelihood that the same judge who presided over the trial will preside over the Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.4(e) (“The proceeding shall be assigned to the sentencing judge where possible.”). Given the lengthy delays between capital trials and post-conviction proceedings, the judge who presided over a capital trial is often unavailable to preside over the Rule 32 proceeding, whether due to retirement or other circumstances. In such cases, a different judge must review the trial record and become familiar with the prior proceedings. By holding the post-conviction proceeding immediately after trial in capital cases, the proposed amendments will reduce the occurrence of such judicial inefficiencies by increasing the likelihood that the same judge can preside over the trial and the Rule 32 proceeding.

This Court’s review of death sentences will also become more efficient with the consolidation of direct review and review from the denial of post-conviction relief. Under the current practice, review of these respective proceedings is often conducted years apart. Also, compilation of the appellate record for the direct appeal (which takes up to a year) will occur concurrently with the PCR proceedings so that the record will be complete by the time the direct appeal proceedings are initiated, saving additional time. These amendments will streamline direct and post-conviction review of death sentences, thereby reducing the time between imposition of a death sentence and the issuance of a warrant of execution.

D. *The amendments will further the goals of the Victims' Bill of Rights.*

By reducing the elapsed time, the proposed amendments further the right of crime victims to prompt and final resolution after conviction and sentence. *See* Ariz. Const. art. II, § 2.1 (A)(10).

E. *The amendments will address the concerns implicated in Martinez v. Ryan.*

The proposed rule amendments also address the United States Supreme Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In *Martinez*, the Court held that the ineffective assistance of counsel at "initial-review collateral proceedings" may establish cause for a prisoner's procedural default of a federal habeas claim of ineffective assistance at trial. *Id.* at 1315. The Court created this equitable remedy for those cases where ineffective assistance of trial counsel claims can only be raised in "initial review collateral proceedings," like Arizona's current system. "By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes a prisoner's ability to file such claims." *Id.* at 1318. The impetus for this shift was the Court's concern that if an attorney errs in an initial-review collateral proceeding, it is likely that no state court at any level will hear the petitioner's claim. *Id.* at 1316.

Nearly all of the 46 Arizona capital defendants currently on habeas appeal have filed motions requesting remands in light of *Martinez* on claims that were never raised in state court. This has significantly affected the prompt resolution of these cases and has added an extraordinary amount of delay.

The proposed amendments would replace Arizona's "initial-review collateral proceeding" and allow for direct review of all claims of ineffective assistance of counsel whether raised in the post-conviction proceeding or on direct review. Thus, the procedural framework which provided context for the equitable rule announced in *Martinez* would no longer exist. Moreover, by holding the post-

conviction proceeding before direct appeal, the proposed system will ensure thorough review of claims of trial counsel's ineffectiveness; appellate counsel will be able to obtain review of any trial counsel ineffectiveness claims rejected by the trial court in the Rule 32 proceeding, as well as any additional ineffectiveness claims not raised by post-conviction counsel.

IV. CONCERNS.

A. *The amendments will not significantly increase costs.*

Based on the Attorney General's prior attempt to enact similar changes legislatively, it is anticipated that there will be objections to these amendments on the theory that the proposed re-ordering of proceedings and simultaneous appointment of PCR and appellate counsel will increase the cost of reviewing capital convictions. The most obvious arguments would be that in cases where a defendant obtains Rule 32 relief, appellate counsel's work up to that point will be for naught, or, if a case is reversed on direct appeal after the PCR proceeding, then the money spent on the PCR will have been wasted.

Neither scenario necessarily increases the cost to capital post-conviction and appellate proceedings. First, reversal in capital cases on direct appeal is exceedingly rare, presumably because in all capital trials the defendant receives two highly-qualified attorneys, *see* Ariz. R. Crim. P. 6.2, 6.8(a), (b), as well as funding for any "reasonably necessary" investigators and expert witnesses. A.R.S. § 13-4013(B). Since 2002, there have been only three reversals of capital convictions,² one reversal of a death sentence under the "abuse of discretion"

² *See State v. Anthony*, 218 Ariz. 439, 189 P.3d 366 (2008); *State v. Minnitt*, 203 Ariz. 431, 55 P.3d 774 (2002); *State v. Prion*, 203 Ariz. 157, 52 P.3d 189 (2002).

standard,³ and, excluding *Ring* remands, only seven remands for resentencing⁴ and five capital sentences reduced to life or natural life under the “independent review” standard.⁵ Thus, reversal of a capital conviction or sentence on direct review after the PCR will be rare.

Nor does the possibility of PCR relief when Rule 32 and appellate counsel are appointed add significant cost to the system in most cases. For example, where a capital defendant obtains PCR relief on a penalty-phase issue and is re-sentenced, appellate counsel can still use any work done on guilt-phase issues in the subsequent direct appeal.

There are also countervailing cost savings. Most significantly, conducting PCR proceedings immediately after the trial will avoid wasted time tracking down missing or misplaced files and long-lost witnesses and evidence. This can greatly reduce the number of hours billed by post-conviction counsel, investigators, and experts in a given case.

Given these circumstances, the potential of increased costs in some cases should not deter this Court from amending the rules as requested.

³ See *State v. Gunches*, 225 Ariz. 22, 234 P.3d 590 (2010).

⁴ See *State v. Lynch*, 225 Ariz. 27, 234 P.3d 595 (2010); *State v. Wallace*, 219 Ariz. 1, 191 P.3d 164 (2008); *State v. Grell*, 212 Ariz. 516, 135 P.3d 696 (2006); *State v. Gomez*, 211 Ariz. 494, 123 P.3d 1131 (2005); *State v. Lamar*, 210 Ariz. 571, 115 P.3d 611 (2005); *State v. Armstrong*, 208 Ariz. 360, 94 P.3d 1076 (2004); *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119 (2004).

⁵ See *State v. Grell*, 231 Ariz. 153, 291 P.3d 350 (2013); *State v. Wallace*, 229 Ariz. 155, 272 P.3d 1046 (2012); *State v. Snelling*, 225 Ariz. 182, 236 P.3d 409 (2010); *State v. Bocharski*, 218 Ariz. 476, 189 P.3d 403 (2008); *State v. Roque*, 213 Ariz. 193, 141 P.3d 368 (2006).

B. The amendments do not reduce the time available to develop claims and affords other investigative advantages.

Currently, the court appoints post-conviction counsel years after the trial. Consequently, counsel spends a great deal of time searching for and recreating trial counsel's files and other records relating to the trial. The proposed rule change calls for the appointment of post-conviction counsel immediately after trial but prior to the completion of the trial transcripts or record on appeal. One potential concern is whether post-conviction counsel will be able to begin independently investigating potential claims without these records.

Appointment of post-conviction counsel prior to completion of the record on appeal poses no obstacle to counsel's investigation of potential claims. The proposed amendments give post-conviction counsel immediate access to trial counsel's complete files. Unlike the current capital post-conviction regime, counsel can review, organize, and digest trial counsel's files close in time to the trial. Likewise, post-conviction counsel will have the ability to interview trial counsel immediately after trial, when trial counsel's memory of relevant events and circumstances is better. In addition, post-conviction counsel can spend the time it takes to complete the record to form the necessary relationship with the client.

C. Review of ineffective assistance of appellate counsel claims can be left to federal courts.

The proposed amendments to Rules 31 and 32 do not provide a procedure for raising ineffective assistance of *appellate* counsel claims, as post-conviction proceedings for capital defendants will end on direct appeal. Review of such claims can occur exclusively in federal habeas corpus proceedings.

This Court could provide an additional state-court proceeding to raise claims of appellate counsel's ineffectiveness, which would receive deference in a subsequent federal habeas challenge under 28 U.S.C. § 2254. *See Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). However, apart from deference, there is no

advantage to that approach. Such a proceeding would add the significant cost of appointing yet another lawyer to review the record and allege additional legal claims, and it would add more time to state capital post-conviction review proceedings. Federal courts can conduct *de novo* review in federal habeas corpus proceedings since claims of ineffective appellate counsel, unlike claims of ineffective trial counsel, are largely record-based, legal claims. *See State v. Cutting*, 15 Ariz. App. 311, 313, 488 P.2d 667, 669 (1971) (appellate claims “must be reviewed and decided solely on the record made in the trial court”). Given the expense and delay that an additional state proceeding to raise appellate counsel's ineffectiveness would create, Petitioner is willing to forgo the benefit of deference in federal court on these types of claims and instead allow *de novo* federal court review.

CONCLUSION

Petitioner respectfully requests that the Court amend Rules 31.2, 31.4, and 31.13, and Rules 32.4 and 32.9 of the Arizona Rules of Criminal Procedure as proposed herein. Petitioner suggests a modified comment period as follows: comments to this petition to be filed on or before May 1, 2014; any amended petition or reply to comments to be filed on or before June 1, 2014; if an amended petition is filed, additional comments to be filed on or before June 30, 2014; and any reply to comments to be filed on or before July 15, 2014.

Respectfully submitted,

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