ARIZONA SUPREME COURT

PETITION TO AMEND RULES 31.2, 31.4(a), 31.13(f), 32.4, and 32.9 ARIZONA RULES OF CRIMINAL PROCEDURE	Supreme Court No. R–14–0010 **Reply to Comments to Amended Petition to Amend Rules 31.2, 31.4(a), 31.13(f), 32.4, and 32.9, Arizona Rules of Criminal Procedure**

The Attorney General's primary motivation for proposing the reordering of capital PCR proceedings to occur directly after the trial is to protect the reliability of the proceedings by conducting investigation and fact-finding closer in time to the relevant events. It is indisputable that "the passage of time only diminishes the reliability of criminal adjudications." *Herrera v. Collins*, 506 U.S. 390, 403 (1993); *see also McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("erosion of memory and dispersion of witnesses that occur with the passage of time . . . diminish the chances of a reliable criminal adjudication"). Under the current system, all involved in capital PCR proceedings, including the defendant, the State, the trial court, and the victims are at a disadvantage brought on by the passage of time. Counsel for the defendant must investigate events that occurred as many as 7 to 10 years earlier, making it difficult to gather evidence, locate witnesses, and develop claims. (*See* Petition, R–14–0010, at 5–6; Amended Petition, R–14–0010, at 4–5.) When witnesses can be located, their memories are necessarily weaker than they

would have been closer in time to the relevant events, whether those events were some occurrence in the defendant's life relevant to mitigation, the crimes at issue, or the original criminal proceedings. These evidentiary difficulties also hurt the State when it must develop evidence to rebut a defendant's factual allegations. And when, due to the passage of time, the trial judge who presided over the original criminal proceedings is no longer available, a new judge must decide extension requests, discovery disputes, the merits of the claims without the advantage of the deeper context that comes with having presided over the trial, and the victims' constitutional right to prompt and final resolution is frustrated. The most effective and direct solution to these deficiencies is to conduct capital PCR proceedings directly after the trial.

The comments to the Attorney General's amended proposal fail to rebut, much less address, the indisputable advantage of moving the capital PCR proceedings directly after trial. While the comments are silent on the primary benefit that would be gained by adoption of the proposed amendments, and most of their points have been previously answered, a few points bear mention. A major criticism in the comments is that the proposed amendments will not significantly reduce the time necessary to review capital cases. (Comments to Amended Petition, R–14–0010, at 3–9.) This perceived criticism misidentifies the primary "delay" the amendments are intended to address: the passage of time that separates

the crimes and trial from the PCR proceeding. There is no doubt that the amendments would drastically reduce this delay, resulting in a more reliable proceeding—a result that all stakeholders should welcome. Furthermore, while the comments contend that the time limits imposed by the amendments will not reduce delay in general, those reasonable and realistic time limits are necessary to correct one of the problems that made the prior system "unworkable"—the lack of uniform, enforceable time limits. (*See* Amended Petition, R–14-0010, at 6–7, 10.)

The comments also overstate any potential confusion and difficulties for counsel that the amendments would create. (*See* Comments to Amended Petition, R–14–0010, at 9–15.) The roles of appellate and PCR counsel would remain substantially the same as under the current way of doing things. The amendment language stating that appellate counsel may raise "any additional, record-based post-conviction issues" is simply meant to clarify that appellate counsel will not be precluded from raising an issue on appeal merely because it was litigated in the PCR proceeding but not included in PCR counsel's petition for review. The key word is "record-based." Thus, if the issue is apparent from the record of the trial or PCR proceeding, appellate counsel in their discretion could raise and argue the issue as in any direct appeal. In other words, the language with which the comments take issue is simply intended to ensure that defendants have the opportunity to bring all potential Rule 32 and appellate claims before the courts. In

general, counsels' duties will remain the same, with the exception that appellate counsel will also review the trial court record from the PCR. There is no reason why this addition to appellate counsel's duties will cause significant confusion or require heightened qualifications.

The time limits set for appellate counsel also are reasonable. Currently, appellate counsel has only 90 days from completion of the record to file the opening brief. Ariz. R. Crim. P. 31.13(f)(1). Under the proposed amendments, appellate counsel can begin reviewing the trial record and preparing the opening brief after completion of the record, while the PCR proceeding is still pending. Then, once there is a ruling in the PCR, appellate counsel has another 90 days—equivalent to the time appellate lawyers now have to complete the entire opening brief—to review the PCR record before the opening brief becomes due. Based on past experience, the PCR petition for review record is generally much smaller than the direct appeal trial record. If an evidentiary hearing is granted, it is normally much shorter than the trial.

The comments additionally overstate the potential for conflict between appellate and PCR counsel. Although the comments point out that a PCR ineffective assistance claim might waive attorney-client privilege in a way that undermines a direct appeal claim, "there is nothing inherently wrong with requiring a criminal defendant to choose among competing rights. As noted by the

Supreme Court, '[t]he criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow." *Owens v. Office of Dist. Attorney*, 896 F. Supp. 2d 1003, 1013 (D. Colo. 2012) (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971)). Furthermore, the letter provided by Roberta Nieslanik, attached to the comments, is not persuasive in arguing against the amendments; it simply posits an unnecessarily complicated hypothetical in an attempt to argue that conducting post-conviction review before direct appeal is all but impossible. There is no reason to believe that most cases will result in such confusion and conflict.

The comments repeat the charge—which Petitioner acknowledges—that due to the order of the proceedings, the amendments do not provide capital defendants with a mechanism for bringing claims of appellate counsel's ineffectiveness in state court, but add that federal review of such claims is inadequate because capital defendants would still be without a means to vindicate their *state* constitutional right to effective appellate counsel. (Comments to Amended Petition, R–14–0010, at 16–17.) This omission has no practical effect. The comments point to no decision of this Court stating that the state constitutional right to effective appellate counsel provides greater protection than the twin federal right, nor is Petitioner aware of any. There is no reason to believe that federal habeas corpus proceedings would be inadequate for the vindication of capital defendants' right to

constitutionally effective appellate counsel.

Finally, the comments' contention that the proposed amendments would actually increase the costs of capital review fails to acknowledge the efficiencies to be gained when the PCR investigation can begin immediately after the trial. True, a rare case may be reversed on direct appeal, after an expensive PCR proceeding. But the facts developed during the PCR will surely prove relevant in the retrial or resentencing. Moreover, it is difficult to envision a legal issue that is a sure winner on appeal that could not be raised in a PCR proceeding in some context that would provide relief.

In sum, the consistent theme throughout the comments is that the proposed amendments are not perfect. But no system is, including the current one. The current system may have the advantage of familiarity, but lacks the proposal's greater advantage of a more reliable proceeding, a result that benefits—and should be welcomed by—all parties. Further, the clear advantages to be gained by reversing the order of the PCR and direct appeal strongly outweigh the comments' criticisms, many of which reflect difficulties that will always be inherent in implementing change. Accordingly, Petitioner respectfully requests that the Court amend Rules 31.2, 31.4(a), and 31.13(f), and Rules 32.4 and 32.9 of the Arizona Rules of Criminal Procedure as proposed in the Attorney General's amended petition.

Respectfully submitted,

Thomas C. Horne
Attorney General
(Firm State Bar No. 14000)

/s/__________________________
Jeffrey A. Zick
Chief Counsel
jeffrey.zick@azag.gov
(State Bar Number 018712)
John Pressley Todd
Assistant Attorney General
John.Todd@azag.gov
(State Bar Number 003863)
Jeffrey L. Sparks
Assistant Attorney General
Jeffrey.sparks@azag.gov
(State Bar Number 027536)
Capital Litigation Section
1275 West Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686
cadocket@azag.gov

3858110