

The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") hereby submits its comments in support of the Petition to Amend Rules 31.2, 31.4, 31.13, 32.4, and 32.9 of the Arizona Rules of Criminal Procedure (Supreme Court No. R-14-0010). The proposed rule change will enhance the reliability of capital post-conviction relief proceedings and potentially reduce delay in capital cases. Accordingly, APAAC respectfully asks this Court to grant the petition.

I. ***The proposed rule change will enhance the reliability of capital post-conviction proceedings.***

Post-conviction relief proceedings are designed as extra-record proceedings—that is, they are forums to develop facts underlying a claim of relief that have not been previously established. *See State v. Tapp*, 133 Ariz. 553, 555, 653 P.2d 10, 12 (App. 1982) (“The purpose of post-conviction relief under Rule 32 is to provide a remedy for matters which do not have a sufficient record to provide appellate review.”), *vacated on other grounds by State v. Tapp*, 133 Ariz. 549, 653 P.2d 6 (1982); *State v. Scrivner*, 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (App. 1982) (“One of the purposes of Rule 32 is to furnish an evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established of record.”), *disapproved of on other grounds by State v. Spreitz*, 202 Ariz. 1, 3, ¶ 11, 39 P.3d 525, 527 (2002); *State v. Bell*, 23 Ariz. App. 169, 171, 531 P.2d 545, 547 (1975) (“In our opinion Rule 32 has as its aim

the establishment of proceedings to determine the facts underlying a defendant's claim for relief when such facts are not otherwise available.”).

In contrast, the direct appeal is a record-based proceeding based on the evidence presented at trial. *See State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997) (“Because our court does not act as a fact-finder, we generally do not consider materials that are outside the record on appeal.”); *State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989) (“[T]he court can determine ineffective assistance of counsel issues only after it has learned of the reasons for counsel’s actions or inactions and has examined the record as a whole to determine whether the defendant received what the adversary system requires. Thus, here, as in other cases, if the defendant wishes to raise an ineffective assistance of counsel issue, he should ordinarily begin someplace other than in this court.”).

The proposed Rule amendments moving the capital post-conviction proceeding to before the direct appeal makes logical sense. The post-conviction proceeding is dependent on evidence that is gathered outside of the record made for direct review. Petitioners in capital post-conviction proceedings need to investigate and develop their post-conviction claims. Currently, capital Rule 32 proceedings take place years after the direct appeal, and conducting the proceeding several years after the trial and crime detrimentally affects its reliability. With each year that passes, witnesses’ memories (including those of trial counsel) fade,

trial counsel's files may become disorganized or misplaced and, despite safeguards in place to preserve it, evidence may be lost. *See State v. Carriger*, 143 Ariz. 142, 146, 692 P.2d 991, 995 (1984) (“When the appeal is filed, the witnesses’ memories and evidence are fresh and readily available should a new trial be required. When a Rule 32 petition is filed, the witnesses’ testimony may be lost because of dimmed memories or death and physical evidence may be lost, destroyed, or misplaced.”). These faded memories and other factors make it more difficult for a defendant to develop and prove his post-conviction claims, and hinder the State’s efforts to ensure, for federal habeas purposes, that a claim is fully developed in state court.

Conducting the post-conviction proceeding, and its associated evidentiary development, prior to the direct appeal ameliorates these concerns and benefits all parties involved. Witnesses, including trial counsel, will be easier to locate and their memories will be fresh. Trial counsel’s files are more likely to be available and intact. Physical evidence is less likely to be lost or misplaced. And critically, the trial judge is more likely to be available to preside over the post-conviction proceeding as Rule 32 contemplates. *See Ariz. R. Crim. P. 32.4(e)*. The trial judge’s involvement dramatically increases the proceeding’s reliability, as the judge observed firsthand counsel’s performance, the credibility of witnesses, and other factors not apparent from the record. *See Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (“[T]he judge presiding on postconviction review was ideally

situated to [determine the relevant facts] because she is the same judge that sentenced [the defendant] and discussed these issues with him.”); *Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998) (stating that if the judge who had presided at the post-conviction proceeding were also the sentencing judge, court “would be considerably less inclined to order relief” because to do so might approach “a looking-glass exercise in folly”) (quotations omitted).

The Rule 32 proceeding is the only collateral proceeding where extra-record facts need to be developed in order to obtain relief. It makes little sense to have the record-based direct appeal first and make defendants and the State wait years in order to develop their post-conviction claims. Moreover, a defendant has a greater interest in knowing first if his conviction is due to errors on the part of his counsel rather than on a point of law.

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

Rule 32 is designed to reduce delay in criminal proceedings while simultaneously protecting a defendant’s rights. *See Carriger*, 143 Ariz. at 145–46, 692 P.2d at 994–95 (1984) (Rule 32 “is not intended to unnecessarily delay the renditions of justice or add a third day in court when fewer days are sufficient to do substantial justice” but is “designed to accommodate the unusual situation where justice ran its course and yet went awry”) (quotations omitted). But in recent years, these goals have not been fulfilled in post-conviction capital cases: delays

due to trial file assembly, locating and interviewing witnesses, and other investigative circumstances have effectively stalled many cases at the post-conviction stage. Often, the post-conviction proceeding is not resolved until a decade or more after the offense. (Petition, at 4–6.) This delay adversely affects the State’s interest in finality, as well as the constitutional right of crime victims to a prompt and final conclusion of the case. Ariz. Const. art. 2 § 2.1(A)(10).

The proposed amendments would substantially reduce this delay, and further Rule 32’s objectives, by streamlining the capital post-conviction investigative process and removing common obstacles to the timely completion of a petition. Capital post-conviction proceedings primarily involve claims of counsel’s ineffectiveness at trial or sentencing. Under the proposed amendments, trial counsel’s file would be available to post-conviction counsel within 7 days of judgment. Post-conviction counsel would begin his or her investigation immediately, and it would proceed concurrently with the preparation of the record on appeal, thereby eliminating a 6 to 9 month period (see Petition, at 3) in which no attorney is working on the case.

While waiting for the record, post-conviction counsel would begin his or her investigation and could accomplish significant tasks. For example, he or she could review the police reports; organize trial counsel’s file; interview trial counsel and other significant witnesses; begin any necessary additional investigation into the

defendant's background for mitigation purposes; begin compiling any records relating to the defendant's social, medical, or mental-health history that appear not to have been previously obtained; begin identifying and consulting with any necessary experts; and identify potential post-conviction claims.

Any suggestion that post-conviction counsel will not be able to investigate claims until the trial transcripts are reviewed should be viewed with skepticism. The defense bar routinely states they must follow the 2003 ABA Guidelines for the Appointment of Defense Counsel in Death Penalty Cases. Those Guidelines, they argue, require post-conviction counsel to investigate the case anew—stating post-conviction counsel must conduct a thorough, independent investigation without relying on the previously compiled record. *See* Guideline 10.15.1. But any independent investigation does not begin with the trial transcripts, it begins—as did trial counsel's investigation—with the charging documents and police reports. Post-conviction counsel can begin her assessment of whether trial counsel's investigation went awry by reviewing the police reports and investigating facts and witnesses contained in those reports. To be sure, the trial transcripts may add context to the post-conviction case, but they do not prohibit counsel from investigating the case anew upon appointment. Thus, any claim that post-conviction counsel will not be able to start an investigation until after reviewing the trial transcripts is without merit.

Further, the proposed requirement that trial counsel make his or her file available immediately effectively eliminates the risk that the file, or portions thereof, will be lost and counsel will have to spend time reconstructing it. The availability of a complete file will, in turn, enable post-conviction counsel to conduct a more focused and efficient investigation. And conducting the post-conviction investigation immediately after trial substantially reduces the risk that witnesses will move and have to be located or that evidence will be lost and have to be found, circumstances that would result in significant delay under the current procedure.

Once transcripts are prepared, post-conviction counsel, having completed a substantial portion of his or her investigation, and likely already aware from trial counsel about the events occurring at trial, can incorporate them into the post-conviction petition in an expeditious manner. And appellate counsel—who would be appointed at the same time as post-conviction counsel—can simultaneously review the transcripts and record, identify record-based appellate claims, and draft the opening brief. When the post-conviction proceeding is complete, appellate counsel could quickly incorporate any post-conviction claims into the brief. Thus, the post-conviction proceeding and the preparation of the appellate brief would proceed, to some extent, on a parallel course, thereby eliminating much of the current delay.

III. ***The proposed rule change will not affect a defendant's ability to bring ineffective-assistance-of-appellate-counsel claims because a defendant may still raise such claims in federal court.***

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

IV. ***Conclusion.***

APAAC strongly supports the proposed amendments to Rules 31.2, 31.4, 31.13, 32.4, and 32.9 of the Arizona Rules of Criminal Procedure. The proposed amendments will change Arizona's capital post-conviction relief procedure for the better. They will reduce delay and further the State's interest in finality, while simultaneously facilitating the defendant's investigation and enhancing the

proceeding's reliability. For the reasons set forth above, this Court should grant the proposed amendments.