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**IN THE SUPREME COURT
IN AND FOR THE STATE OF ARIZONA**

In the matter of:

Petition to Amend Ariz. R. Crim. P.
31.20 and Ariz. R. Civ. App. P. 22

Arizona Supreme Court
No. R-25-

**Petition to Amend Ariz. R. Crim. P.
31.20 and Ariz. R. Civ. App. P. 22
to Provide En Banc
Reconsideration by the Court of
Appeals**

Pursuant to Rule 28(a) of the Arizona Supreme Court Rules, undersigned counsel petitions this Court to provide a procedure for the Arizona Court of Appeals to conduct en banc reconsideration of appeals and other proceedings by amending Rule 31.20 of the Arizona Rules of Criminal Procedure and Rule 22 of the Arizona Rules of Civil Appellate Procedure. The proposed amendments blend well-tested procedures set forth under Rule 40 of the Federal Rules of Appellate Procedure and existing Arizona rules governing reconsideration by the Court of Appeals. If adopted, en banc reconsideration will improve Arizona's justice systems and align it with the majority of states' method of ensuring the uniform interpretation of the law by intermediate state appellate courts.

I. Reasons Supporting Reconsideration En Banc

A. Arizona has but one Court of Appeals, yet it may be divided.

The Arizona Legislature has established a court of appeals constituting a “single court.” A.R.S. § 12-120(A). Although the Court of Appeals is a single court, it is divided by statute into two divisions, Division 1 and Division 2. A.R.S. § 12-120(B). In 2022, the Arizona Legislature authorized the transfer of matters “between divisions in order to equalize caseloads and for the best use of judicial resources.” A.R.S. § 12-120(E).

Yet, despite being a “single court,” the Legislature has only authorized the Court of Appeals to issue decisions by departments consisting of not more than 3 judges or divisions of the Court of Appeals. A.R.S. § 12-120(F); A.R.S. § 12-120.07(A). By statute, the “opinion of a division or department of a department shall be the opinion of the court of appeals.” A.R.S. § 12-120.07(A).

But departments and divisions do not always agree. Sometimes they conflict.

And although Arizona statute still permits divisions of the Court of Appeals to decide cases as a division, this has apparently not been done since 1984. *State v. Patterson*, 222 Ariz. 574, 576, ¶ 8 (App. 2009).

“The departmental, and previous divisional, structure of [the Court of Appeals] inevitably can and does lead to conflicting decisions.” *State v. Patterson*, 222 Ariz. 574, 577, ¶ 11 (App. 2009) (collecting conflicting cases).

And this Court apparently has not squarely addressed how lower courts are to interpret conflicting decisions issued by the Court of Appeals. *See Patterson*, 222 Ariz. at 578-580, ¶¶ 13-19 (surveying this Court’s jurisprudence concerning divisional splits and concluding there are no binding precedents endorsing geographic rule).

Thus, if confronted with a department or divisional split, lower courts are only required to “use its discretion to adopt the decision that most persuasively interprets the law, regardless of the division to which the department making the decision belongs or within which the trial court sits.” *Patterson*, 222 Ariz. at 580, ¶ 20.

The confusion and uncertainty stemming inconsistent decisions of the Court of Appeals justifies this Court’s exercise of its constitutional rule-making authority to provide for en banc review by the Court of Appeals.

B. The Arizona Constitution vests procedural rule-making power over the judiciary with this Court, not the Legislature.

The Arizona Constitution vests with this Court, “Power to make rules relative to all procedural matters in any court.” Ariz. Const. art. VI, § 5(5). Although this Court has recognized that the Legislature may pass statutes governing court rules, it has also recognized that the Legislature may only dictate substantive rules of procedure whereas this Court’s constitutional authority governs procedural rules. *See Seisinger v. Siebel*, 220 Ariz. 85, 91-93, ¶¶ 24-30 (2009) (describing and

applying separation of powers principles concerning rule-making authority). A substantive rule “creates” or “defines and regulates rights.” *Siebel*, 220 Ariz. at 92, ¶ 29 (quoting *State v. Birmingham*, 96 Ariz. 109, 110 (1964)). A procedural rule “prescribes the practice, method, procedure or legal machinery by which the substantive law is enforced or made effective.” *Id.*

This Court has aptly demonstrated its commitment to using its constitutional procedural rule-making authority to promote improvements to our justice system. *See, e.g.*, Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 Colum. L. Rev. 1 (2024) (discussing this Court’s role in a “century-long conflict between state judiciaries and legislatures for control over criminal procedure”). Moreover, the very process by which this procedural reform is proposed—Ariz. R. Sup. Ct. 28—reflects the means by which Arizona voters entrusted within this Court in 1960 to enact procedural reforms to improve our justice system. *See* Darrow K. Soll, *Mending Constitutional Fences*, Ariz. Att’y, Feb. 2002 (2002) (providing historical context to the 1960 constitutional amendment vesting procedural rule-making authority with this Court).

By asserting its constitutional rule-making authority, this Court should align Arizona with other states that entrust their intermediate appellate courts with en banc review.

C. Other states provide for en banc review by intermediate appellate courts.

A survey conducted in New York established that 23 states, the District of Columbia, and the entire federal court system provide en banc review by their intermediate appellate courts. *See En Banc Review in New York Court*, New York City Bar Association Committee on State Courts of Superior Jurisdiction, (available at https://www.nycbar.org/wp-content/uploads/2023/05/En_Banc_Article.pdf) (last accessed Jan. 03, 2025). The same survey also determined that only 41 states have intermediate appellate courts. *Id.* at 8. It also put Arizona in the same category of 12 states as New York that have large intermediate appellate courts without en banc review. *Id.* at 9.

Arizona should no longer remain in the minority of jurisdictions that deny en banc review to litigants in intermediate appellate courts because en banc review promotes fairness, uniformity, and well-reasoned justice.

D. En banc review promotes fairness, uniform justice, and the well-reasoned application of the law.

Uniformity is the “most basic principle of jurisprudence.” Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 758 (1982). “Uniformity promotes the twin goals of equity and judicial integrity.” Note, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 Yale L.J. 1505 (1986)). The

predictability of the legal process enabled by uniformity of decisions provides the “consistency and moral stature essential for the public's confidence in the justice system.” John E. Simonett, *The Use of the Term Result-Oriented to Characterize Appellate Decisions*, 10 Wm. Mitchell L. Rev. 187, 202 (1984).

Yet, Arizona law does not embrace uniformity. Instead, unless the Arizona Supreme Court steps in, Arizona law embraces disparate and, at times, chaotic interpretation of the law. *See Patterson*, 222 Ariz. at 580, ¶ 20 (acknowledging the lack of direction to lower courts caused by split appellate authority.).

En banc review promotes uniformity and the refinement of the law by balancing the need of a court to “follow its own prior opinions against the need for the law to evolve.” Christopher M. Jackson, *A Proposal to Institute En Banc Review at the Colorado Court of Appeals*, 97 Denv. L. Rev. Forum 1, 12 (2020) (internal citation omitted). And where exceptional issues are presented, en banc review offers the opportunity for the refinement of the law. “After all, one reason for having multiple judges on appellate courts is that their ‘different perceptions, premises, logic, and values ... insures a better judgment.’” Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 822–23 (1993) (internal citation omitted).

The refining wisdom offered by multiple judges would be conferred upon our judiciary by the deliberative act of voting whether to grant en banc reconsideration.

“Even when an en banc motions fails . . . the adjudicative process nonetheless benefits from the internal discussion.” *State v. Petagine*, 290 So. 3d 1106, 1118 (Fla. Dist. Ct. App. 2020) (Makar, J., dissenting in part from denial of rehearing en banc). Such votes bring about the “[t]he collective wisdom of the court ...[and] makes the end product better.” *Id.*

When the Court of Appeals operates more uniformly and with more collective wisdom, this Court’s efficiency is also improved. Less time is required to resolve disputes between panels of the Court of Appeals. And when an exceptionally important issue does arise, en banc review will promote refined advocacy and enable this Court to focus more discretely on the issue presented if needs to consider them after en banc review by the intermediate appellate court. *See Michael Ashley Stein, Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L. Rev. 805, 827 (1993) (promoting more use of en banc review in federal courts for these reasons.)

E. En banc review can be added to existing procedures authorizing motions for reconsideration.

Currently, the Arizona’s appellate procedure rules authorize the Court of Appeals to reconsider its own decisions. Ariz. R. Crim. P. 31.20; Ariz. R. Civ. App. P. 22. Both provide that a party may seek reconsideration of a ruling premised upon an “erroneous” determination of “law or fact.” Ariz. R. Crim. P. 31.20(b); Ariz. R. Civ. App. P. 22(b).

This proposal suggests supplementing existing reconsideration procedures by adding en banc review in addition to the ability to seek reconsideration by a panel. Proposed Ariz. R. Crim. P. 31.20(a); Proposed Ariz. R. Civ. App. P. 22(a). But the proposal limits the basis by which a party may seek en banc review to scenarios “necessary to maintain uniformity of the court’s decisions” or that present a “question of exceptional importance.” Proposed Ariz. R. Crim. P. 31.20(a)(1) & (2); Proposed Ariz. R. Civ. App. P. 22(a)(1) & (2). Thus, the proposal for en banc review is more restrictive than current procedures allowing reconsideration for mere error correction.

And the proposal mirrors a tried and proven procedure grounded in federal appellate advocacy via Rule 40 of the Federal Rules of Appellate Procedure. *Compare* Fed. R. App. P. 40(b)(2) *with* Proposed Ariz. R. Crim. P. 31.20(a)(1) & (2); Proposed Ariz. R. Civ. App. P. 22(a)(1) & (2). Like its federal counterpart, once a motion for reconsideration en banc is filed, a vote need not occur unless “one judge calls for a vote.” Proposed Ariz. R. Crim. P. 31.20(a); Proposed Ariz. R. Civ. App. P. 22(a); Fed. R. App. P. 40(c).

If a vote is called, the proposal requires a majority of judges within each division to vote in favor of reconsideration en banc. Proposed Ariz. R. Crim. P. 31.20(a); Proposed Ariz. R. Civ. App. P. 22(a). The proposal requires majorities within each division to vote in favor of reconsideration en banc to prevent the

numerical disparity of judges in the divisions from creating imbalance in the voting procedure and to ensure that en banc reconsideration remains a method of review that is “not favored and ordinarily will not be ordered.” Proposed Ariz. R. Crim. P. 31.20(a); Proposed Ariz. R. Civ. App. P. 22(a); Fed. R. App. P. 40(c).

If reconsideration en banc is granted, the proposal provides for review by “11 randomly selected judges from the combined divisions.” Proposed Ariz. R. Crim. P. 31.20(a); Proposed Ariz. R. Civ. App. P. 22(a). This part of the proposal reflects the 11-judge en banc review process conducted by the United States Court of Appeals for the Ninth Circuit. *See* CTA9 Rule 40-3 (authorizing 10 of 29 judges plus the Chief Judge to sit en banc).

Narrowing the en banc review to 11 judges makes the process more manageable for the Court of Appeals. And the randomized selection from the combined divisions ensures that neither division routinely asserts a disproportionate influence on outcomes.

The rest of the proposed amendments¹ to Ariz. R. Crim. P. 31.20; Ariz. R. Civ. App. P. 22 merely conform the existing rules to include references to en banc reconsideration.

¹ If the proposal is adopted, other conforming amendments may be required to ensure consistency in appellate procedure rules referencing reconsideration currently authorized by Ariz. R. Crim. P. 31.20; Ariz. R. Civ. App. P. 22. *See, e.g.* Ariz. R. Crim. P. 31.21(c); ; Ariz. R. Civ. App. P. 22 (concerning stays of deadlines for petitions for review pending motions for reconsideration).

II. Conclusion

For the reasons stated within this Petition, undersigned counsel respectfully recommends that this Court use its constitutional rule-making authority to establish a mechanism for en banc reconsideration by the Court of Appeals.

Respectfully submitted this 10th day of January, 2025

By: /s/ Kevin D. Heade

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APPENDIX A

Arizona Rules of Criminal Procedure

(deletions shown with strikethrough, new language is underlined)

Rule 31.20. Motion for Reconsideration or Motion for Reconsideration En Banc

(a) When Reconsideration En Banc May Be Ordered. An appeal or other proceeding may be reconsidered by the Court of Appeals en banc if a majority of judges within each division of the Court of Appeals vote to grant reconsideration en banc. Unless one judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard. If granted, en banc reconsideration is conducted by 11 randomly selected judges from the combined divisions. An en banc reconsideration is not favored and ordinarily will be not be ordered unless:

(1) en banc reconsideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(a) (b) Purpose and Necessity. A party may file a motion for reconsideration or reconsideration en banc requesting an appellate court to reconsider whether its decision contained erroneous determinations of fact or law. A party need not file a motion for reconsideration or motion for reconsideration en banc in the Court of Appeals before filing a petition for review under Rule 31.21.

(b) (c) Required Showing. A motion for reconsideration or reconsideration en banc must state with particularity the points of law or fact that the party believes the appellate court has erroneously determined, or any changes in the law after briefing or oral argument that may entitle the party to relief.

(c) (d) Filing and Timing. A party desiring reconsideration or reconsideration en banc of a decision must file a motion for reconsideration in the appellate court no later than 15 days after entry of the decision. A motion to extend this deadline must be filed in the appellate court that issued the decision. A party may amend a motion for reconsideration or a motion for reconsideration en banc only with the court's permission.

(d) (e) Response. A party may not file a response to a motion for reconsideration or motion for reconsideration en banc unless requested by the appellate court to do

so, but the court will not grant the motion without requesting the opposing party to file a response.

(e) **(f) Form and Length.** A motion for reconsideration, motion for reconsideration en banc, or a response to a motion for reconsideration must comply with Rule 31.6(b). A motion for reconsideration, motion for reconsideration en banc, or a response to a motion for reconsideration may not exceed 3,500 words. A certificate of compliance, as provided in Form 30, must accompany a motion for reconsideration or a response. A party preparing this certificate may rely on the word count of the word processing system used to prepare the motion or response if it counts the required words including any footnotes.

(f) **(g) Motions Not Permitted.** Unless permitted by specific appellate court order, no party may file a motion for reconsideration of an order denying a motion for reconsideration, an order denying a motion for reconsideration en banc, an order denying a petition for review by the Supreme Court, or an order declining to accept jurisdiction of a petition for special action.

APPENDIX B

Arizona Rules of Civil Appellate Procedure

(deletions shown with strikethrough, new language is underlined)

Rule 22. Motion for Reconsideration or Motion for Reconsideration En Banc

(a) When Reconsideration En Banc May Be Ordered: An appeal or other proceeding may be reconsidered by the Court of Appeals en banc if a majority of judges within each division of the Court of Appeals vote to grant reconsideration en banc. Unless one judge calls for a vote, a vote need not be taken to determine whether the case will be so reheard. If granted, en banc reconsideration is conducted by 11 randomly selected judges from the combined divisions. An en banc reconsideration is not favored and ordinarily will be not be ordered unless:

(1) en banc reconsideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

~~(a)~~ **(b) Purpose and Necessity.** A motion for reconsideration or motion for reconsideration en banc requests an appellate court to consider whether its decision contained erroneous determinations of fact or law. A party is not required to file a motion for reconsideration in the Court of Appeals in order to file a petition for review under Rule 23.

~~(b)~~ **(c) Required Showing.** A motion for reconsideration or motion for reconsideration en banc must state with particularity the points of law or fact that the party believes the appellate court has erroneously determined, or any changes in the law after briefing or oral argument that may entitle the party to relief.

~~(c)~~ **(d) Timing.** A party desiring reconsideration or reconsideration en banc of a decision must file a motion for reconsideration or a motion for reconsideration en banc in the appellate court within 15 days after the appellate court enters its decision. A party may amend a motion for reconsideration or a motion for reconsideration en banc only with the appellate court's permission.

~~(d)~~ **(e) Response.** A party may not file a response to a motion for reconsideration or a motion for reconsideration en banc unless requested by the appellate court to do so, but the appellate court will not grant the motion without requesting the opposing party to file a response.

~~(e)~~ **(f) Form and Length.** A motion for reconsideration, a motion for reconsideration en banc, or a response to a motion for reconsideration must comply with the provisions of Rule 4(a)-(c). A motion for reconsideration, motion for reconsideration en banc, or response to a motion for reconsideration may not exceed 3,500 words. A certificate of compliance, as provided in Form 2, must accompany a motion for reconsideration, motion for reconsideration en banc, or a response. A party preparing this certificate may rely on the word count of the processing system used to prepare the motion or response.

~~(f)~~ **(g) Motions Not Permitted.** Unless permitted by specific appellate court order, no party may file a motion for reconsideration of an order denying a motion for reconsideration, an order denying a motion for reconsideration en banc, an order denying a petition for review, or an order declining to accept jurisdiction of a petition for special action.