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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: Petition to Amend Rule 32.4 of Arizona Rules of Criminal Procedure	No. R-14-0012 **COMMENT OF THE MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE, PIMA COUNTY PUBLIC DEFENDER'S OFFICE, YUMA COUNTY PUBLIC DEFENDER'S OFFICE, COCONINO COUNTY PUBLIC DEFENDER'S OFFICE, AND MARICOPA COUNTY OFFICE OF THE LEGAL ADVOCATE REGARDING PETITION TO AMEND RULE 32.4 OF ARIZONA RULES OF CRIMINAL PROCEDURE**

Pursuant to Rule 28 of the Arizona Rules of Supreme Court, the Maricopa County Public Defender's Office ("MCPD"), Pima County Public Defender's Office ("PCPD"), Coconino County Public Defender's Office ("CCPD"), and Maricopa County Office of the Legal Advocate ("MCOLA") submit the following comment to the above-referenced petition.

MCPD is the largest indigent defense law firm in the State of Arizona with over 200 deputy public defenders providing indigent legal services in the Maricopa County Justice and Superior Courts. During the past fiscal year, the MCPD handled almost 36,000 criminal cases. Pima County Public Defender's Office ("PCPD") is the second largest indigent defense law firm in Arizona with approximately 80 assistant public defenders providing indigent legal services in the Pima County Superior Court, Juvenile Court, and appellate courts. The Yuma County Public Defender's Office and Coconino County Public Defender's Office which represent indigent defendants in the sixth and seventh most populated counties in Arizona, respectively, also join in this comment. The Maricopa County Office of the Legal Advocate also represents indigent defendants in post-conviction proceedings in Maricopa County, the most populated county in Arizona.

DISCUSSION

The indigent defense agencies oppose the proposed rule change. Foremost, the proposed rule change does not accomplish its stated goals. Instead, transcripts will still be required under the proposed amendment and the amendment would also require the Clerk's Office to provide a complete record, which is not currently required under Rule 32. However, even if the proposed amendment operated as intended, the amendment should still be rejected. The proposed rule would

substantially increase the work burden of defense attorneys, prosecutors, and the trial courts. The proposed rule also interferes with a defendant's ability to file a petition for review. Additionally, the proposed rule would interfere with the ethical duty of attorneys to provide clients with the contents of any file in the attorney's possession. Finally, particularly in light of the fact that trial transcripts must be prepared in accordance with Rule 31.8 of trial and related proceedings for a direct appeal, any potential benefit of the proposed amendment is negligible in light of the large amount of transcripts that would be required even under the proposed amendment.

1. The proposed modification does not accomplish its stated goals.

The goal of the proposed modification is to avoid the production and cost of transcripts in Post-Conviction Relief cases. However, the proposed modification fails to accomplish this goal. The proposed rule would require the preparation and production of "the record" upon request. The word "record" has already been defined within the Criminal Rules:

> The record on appeal to the appellate court shall be a certified transcript, all documents, papers, books and photographs introduced into evidence, and all pleadings and documents in the file … and if authorized by the appellate court, an electronic recording of the proceeding.

Ariz.R.Crim.P. 31.8(a)(1). By indicating the record "shall be a certified transcript," the rule clearly requires a transcript. An electronic proceeding is

supplementary, not a substitute for the transcript. The rule makes this clear with the use of "and" as opposed to "or." *Id.* ("… and if authorized by the appellate court, an electronic recording of the proceeding.").

By requiring the production of "the record," the proposed modification inherently references the definition of the record in Rule 31.8. *See State v. Diaz*, 224 Ariz. 322, ¶ 10, 230 P.3d 705, 707 (2010) ("We look first at the language of the statutes to determine their meaning … and examine related statutes in the statutory scheme, which may shed light on the proper interpretation of the statutes in question; we also attempt to harmonize competing sentencing statutes if it is possible to do so." (internal citations omitted)); *State v. Fitzgerald*, 232 Ariz. 208, ¶¶ 18-20, 303 P.3d 519, 523-24 (2013) (evaluating Ariz.R.Crim.P. 24.1 in context of other procedural rules). Rule 32.9 also considers certified transcripts as part of "the record." Ariz.R.Crim.P. Rule 32.9(c) (notice of filing of petition for review may designate the record, including "any additional certified transcripts of trial court proceedings that were prepared pursuant to Rule 32.4(d)"); Rule 32.9(e) (record includes "the trial court file and the certified transcript"). The proposed modification provides no alternative definition for "the record" and there is no good reason to read "the record" differently in Rules 31 and 32. Both deal with post-conviction proceedings (appeal and collateral review). Both involve references to minute entries, documents, papers, photographs, and other documents

(such as settlement conference memoranda, sentencing memoranda, mitigation reports, mental/physical health records, service records). A "record" would operate the same in both. Thus, to the extent the modification would require the preparation of a "record," the modification would actually increase the expense and burden placed upon the courts.

Currently, a "record" is not required under Rule 32.4; only transcripts are required. Attorneys in Maricopa County have the ability to access the remainder of the "record" through the court's online docket system. Pima County's access to the superior court's online docket system is generally limited to governmental agencies, but the Clerk is moving toward greater ease of access for the public. Thus, there is no burden placed upon the court clerks to produce a "record" in Rule 32 proceedings. Under the proposed modification, however, the Clerk's Office would be tasked with producing a "record" in accordance with Rule 31.8 even for Petitions for Post-Conviction Relief in plea cases. Such a record would, by definition, include a certified transcript. Thus, the proposed modification, as worded, does not decrease costs and burdens. The proposed modification would still require the production of a transcript because a transcript is part of "the record" and the proposed modification would require the Clerk's Office to take additional steps not presently required. Such a change would not alleviate the Court of costs. The proposed modification would only increase costs.

2. **Presuming the proposed rule change would limit the preparation of transcripts, the proposed rule change would drastically increase the work burden placed upon attorneys and the courts.**

If a separate interpretation of "the record" was employed and the intent of the amendment was given effect, the proposed rule change would unnecessarily increase the work burden placed upon attorneys, the courts, and court staff. The increased work burden placed upon attorneys and the courts comes in several different manners. First, it is faster to read a proceeding than to watch a proceeding. Reading pace eclipses speaking pace and therefore makes reading a proceeding faster as a starting point.[1] Additionally, attorneys would have to sit and listen to pauses and breaks in proceedings in order to ensure the attorney knew when the break ended. Some breaks can take substantial periods of time. When dealing with full trial days, this impact is substantial. Listening through a single day's proceedings would take an attorney an entire day. Reading through an entire day's proceedings takes substantially less time.[2] This inefficiency is then

[1] "The average adult reads prose text at 250 to 300 words per minute. While proofreading materials, people are able to read at 200 wpm on paper, and 180 wpm on a monitor." Words per minute, Reading and comprehension, http://en.wikipedia.org/wiki/Words_per_minute. "Audiobooks are recommended to be 150-160 words per minute, which is the range that people comfortably hear and vocalize words." Words per minute, Speech and listening, http://en.wikipedia.org/wiki/Words_per_minute.

[2] This can be seen by comparing rate differences. If we presume a high average speaking rate (160 wpm) and even the slower proofreading rate (200 wpm), reading is at least 20% more efficient than listening. In a perfect hypothetical (with no breaks, pauses, or transitions), a one hour hearing would contain

compounded over time. As attorneys investigate and research issues, attorneys must review proceedings. With every subsequent review, the inefficiency between listening and reading is compounded.

Drafting petitions also becomes a far more burdensome process. In drafting petitions attorneys will need to constantly rewind the recording in order to transcribe statements chunks at a time. A trained touch-typer can transcribe written material seamlessly. Even a trained touch-typer, however, must take breaks when transcribing from video.[3] Such inefficiency does not exist, however, for court reporters. Court reporters can reach substantially faster rates of recording.[4] To insert quotations, even attorneys who are proficient typists will need to repeatedly view the recording, determine what is said, type what is said,

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approximately 9,600 words. This same one hour hearing would be read by the average person (at a proofreading rate) in 48 minutes. If the reading rate is akin to a slow prose reading rate (250 wpm) the one hour proceeding would be finished in less than 39 minutes. Such a presumption does not even account for breaks or pauses in proceedings. In such a case a 60 minute proceeding would still require 60 minutes to listen, but substantially less time to read.

[3] "An average professional typist types usually in speeds of 50 to 80 wpm …." Words per minute, Alphanumeric entry, http://en.wikipedia.org/wiki/Words_per_minute.

[4] *See* Words per minute, Stenotype, http://en.wikipedia.org/wiki/Words_per_minute (noting stenotype students "are usually able to reach speeds of 100-120 wpm within six months" and trained professionals "input text as fast as 225 wpm or faster").

rewind the recording, and repeat the process. With the benefit of a transcript, however, this process is far more efficient.[5]

Inefficiencies continue throughout the litigation. Attorneys evaluating an opposing petition currently need to merely grab the transcript and flip to a cited page. However, with video/audio recordings the attorney must load the proceeding, fast-forward and rewind to the specified location, listen to the proceeding, decipher what is being said, and repeat the process as necessary. Such a process is drastically less efficient than simply referring to a transcript.

This inefficiency would also be transferred to the courts. Not only would attorneys have to listen through the proceedings; courts ruling upon Petitions for Post-Conviction Relief would also have to listen through proceedings. Judicial officers, just like attorneys, can more efficiently read a proceeding than listen to a

[5] Citations themselves would create inefficiencies. The appropriate citation to an audio or video recording does not include pin citations to the time of a statement. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18.5 and 18.6 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005); ALWD & Darby Dickerson, *ALWD Citation Manual* R. 33 and 34 (2d ed. Aspen Publishers 2003). If citations are made per a traditional method, advocates and courts would be left continually scanning and searching for where in the recording a statement is made. Even if attorneys create an informal method for pin-citations to the recordings, such a system would make formatting burdensome. Such a citation may appear as: FTR, Courtroom, Date, at Time span (FTR, North Court 17A, 1/9/2014, at 14:32:15-14:34:45). Any "*Id.*" citations would almost always need new time span citations. Attorneys would be required to laboriously replay sections in order to find the second when pertinent sections begin and end. Standardized methods for citations to transcripts already exist, are commonly known and understood, and do not require attorneys or courts to arduously determine the precise second when pertinent sections begin and end.

proceeding. Similarly, courts will have to fast-forward and rewind recording tapes to get to specific locations cited within petitions, as opposed to merely flipping to a page. Finally, courts will have to go through the same inefficient process when citing to the record in minute entries.

One final increased work burden will impact all parties and the courts equally: litigation over the contents of the record. When a transcript is produced, the transcript "shall be deemed prima facie a correct statement of the testimony taken and proceedings had." Ariz.R.Sup.Ct. Rule 30(b)(4). Thus, when a transcript is produced there is no need to litigate over the contents of the record—the transcript contains the discussions held in court. Where a video or audio recording is used, however, no such presumption exists. Rather, the Court of Appeals has expressly held, in a civil case, that audio/video recordings are not official. *Gersten v. Gersten*, 223 Ariz. 99, ¶ 16 n.7, 219 P.3d 309, 315 n.7 (App. 2009) ("The FTR recordings are not official transcriptions of the proceedings."). Parties will listen to the same recording and reach different conclusions regarding the contents. Under the proposed rule change, parties will have to litigate, and the courts will have to determine, the contents of the record. Such litigation will inevitably require each party and the court to spend substantial periods of time listening to, deciphering, and concluding what was said. Moreover, there is no method for review in such a circumstance because audio/video recordings will not

be reviewed by appellate courts for content. *See id.* ("[W]e reviewed the recordings only to assess the accuracy of Judge Brnovich's description of them; we did not review them for content.").

This issue underscores an additional concern: the proposed rule would force defense attorneys to make decisions about whether there is an issue based upon an unofficial and uncertified recording. If attorneys are to be expected to assess whether issues are worth briefing, attorneys should at a minimum be entitled to certified and official accountings of the record. Otherwise attorneys would be forced to make decisions without adequate information.

The current system does not carry these unique disadvantages. Court reporters are trained to determine what is said during court proceedings, thereby justifying the deference this Court has shown to transcripts produced by certified transcribers. Court reporters produce certified and official transcripts from which the parties can work with minimal need to litigate the contents. Courts can adequately rely upon the transcripts as "prima facie a correct statement of the testimony taken and proceedings had." Ariz.R.Sup.Ct. Rule 30(b)(4).

Where an issue exists, the process set forth by the Petition drastically increases the work burden. The work burden will not be borne solely by defense attorneys; the increased work burden will apply to prosecutors and the courts. The Clerk's Office will also experience an increased workload in light of the need to

produce a record in Rule 32 proceedings, as discussed in section 1, above. The only way to obviate this problem is to produce a certified transcript in cases where there is an issue.

3. The proposed rule change interferes with the right of a defendant to his or her file.

An attorney's file is more accurately considered the defendant's file. The Ethical Rules require attorneys, upon termination of representation, to surrender "documents and property to which the client is entitled," including "all of the client's documents, and all documents reflecting work performed for the client." Ariz.R.Sup.Ct. Rule 42, E.R. 1.16(d); *see also Matter of Struthers*, 179 Ariz. 216, 224-25, 877 P.2d 789, 798-99 (1994). This requirement extends to the disclosure of transcripts. *See In re Pamela Eaton*, State Bar No. 11-4052, 2013 WL 1963873 (Ariz.Disp.Com. 2013) ("Ms. Eaton never contacted [client], never sent him his transcripts, and never informed him that she had filed his direct appeal…. Ms. Eaton violated … ER 1.16(d) by failing to provide [client] with his transcripts …."). This is particularly appropriate in Rule 32 cases where the attorney files a Notice of Completion. After the Notice of Completion is filed the attorney must send the file, with transcripts, to the defendant so the defendant can file a Petition *pro se*. While an attorney might send a defendant the recording on a CD, this is useless for many defendants. For the small number of defendants who are not incarcerated, such a CD would only be useful if the defendant has access to a

computer and the ability to download software to that computer.[6] Indigent defendants who only have access to publicly available computers (through libraries or internet cafes) are unable to download such software. However, the greater concern is with incarcerated defendants, which is a substantial portion of the defendants who file Rule 32 Petitions.[7] Incarcerated defendants have no way to access computers. The Director of the Department of Corrections is responsible for setting for rules "to limit inmate access to the internet through the use of a computer, computer system, network, computer service provider or remote computing service." A.R.S. § 41-1604(A)(9). The policy which has been set forth expressly prohibits inmates from using computers for legal work:

> The Department shall not make computers or typewriters available to inmates in the unit Library for the purpose of enabling inmates to do legal work. Only inmates who have a qualifying disability may be provided a personal typewriter pursuant to a court order.

AZ DOC Policies, Ch. 900 "Inmate Programs and Services," Dept. Order 902 "Inmate Legal Access to the Courts," Order 902.02 "Legal Resources and Accommodations," § 1.8 (accessed at http://www.azcorrections.gov/

[6] FTR recordings, used in Maricopa County, are proprietary and require a person to download software in order to play the recordings. *See* http://www.fortherecord.com/products/player/.

[7] MCPD was able to access data regarding current PCR clients. Of the currently represented PCR clients, over 93% are presently in custody. Although the indigent defense agencies do not have more comprehensive data readily accessible, it is generally understood that the majority of PCR petitioners (whether represented or not) are incarcerated.

Policies/900/0902.pdf, pg. 3). Contrary to the assertion in the Petition that a certified transcript is unnecessary when a Notice of Completion is filed, *see* Pet. Pg.3, transcripts would still be produced for a substantial portion of the cases in which a Notice of Completion is filed.

4. The proposed rule impedes the ability of defendants to file petitions for review.

After a trial court has ruled on a Petition for Post Conviction Relief, a party may file a Petition for Review with the Court of Appeals. Ariz.R.Crim.P. 32.9(c). As indicated above, the Rules of Criminal Procedure require a certified transcript of court proceedings. Ariz.R.Crim.P. 31.8(a)(1). Additionally, the proposed change does not alter the language related to Petitions for Review. *C.f.* Ariz.R.Crim.P. 32.9(c) and (e) (both considering certified transcripts as part of the record). Appellate courts do not consider the recordings as "official" designations of the record. *See Gersten v. Gersten*, 223 Ariz. 99, ¶ 16 n.7, 219 P.3d 309, 315 n.7 (App. 2009) ("The FTR recordings are not official transcriptions of the proceedings."). Appellate courts do not accept audio/video recordings as a substitute for official transcriptions. Thus, a certified transcript must be obtained before any petition for review is filed. This is true regardless of whether the defendant's attorney files the petition for review or the defendant files the petition for review *pro se*.

Moreover, it is unlikely appellate courts would shift to audio/visual recordings. This is due, in part, to the lack of a consistent system. Maricopa County uses "For the Record," a proprietary system which requires viewers to download a unique "For the Record" player from the website. Yuma County uses a different system, the Jefferson Audio Visual System, otherwise known as JAVS. Because accommodation of recordings would require Arizona's appellate courts to employ multiple systems, such an accommodation would be unreasonable. Transcripts will likely continue to be the only certified and official version of what is said during court.

5. The proposed rule does not eliminate the cost of transcripts; the proposed rule merely delays or shifts the cost of transcripts.

As noted above, the premise underlying the Petition's syllogism, that transcripts may not always be required, is specious. When litigating an issue petition the trial courts will need an official transcript or will otherwise need to engage in lengthy and unnecessary determinations of the content of the recordings. This is despite the clear legal guidance that such a recording is unofficial and will not be reviewed by the Court of Appeals. Where the attorney decides not to file an issue petition, the attorney will have to provide transcripts to most criminal defendants in order to comply with Ethical Rule 1.16 and to empower the defendant's right to file a petition *pro se*. Whether filed by the attorney or a *pro se* defendant, transcripts will always be required when a petition for review is filed.

Because of these burdens and ethical requirements, the likely result is that transcripts will still be produced in the vast majority of cases. The transcripts will simply be produced at a different time. However, with the proposed amendment there will be no mechanism in place to guarantee attorneys, the people whom would benefit the most from official and certified transcripts, have access to these transcripts.

The public defender agencies acknowledge the need to control costs. This petition, however, will at best fail to reduce costs. At worst, for these reasons, it could result in greater costs.

6. The proposed amendment will cause further delays in an already burdened system.

The public has an "interest in judicial economy, efficiency and fairness." *State v. Cromwell*, 211 Ariz. 181, ¶ 31, 119 P.3d 448, 454 (2005). The proposed rule change, however, would undercut these very goals. Judicial economy and efficiency would be undercut by the inefficiencies that will arise when working with recordings rather than transcripts. These inefficiencies will cause delays in initial filings of issue petitions or notices of completion, responses, and rulings. Resolutions will be delayed due to litigation over the content of recordings. *Pro se* petitions will be delayed due to the inevitable need for transcripts when a Notice of Completion has been filed. Petitions for Review will be delayed due to the need for transcripts when a case moves to the Court of Appeals. The proposed

amendment would not alleviate the burdens of the current system. The proposed amendment merely creates additional burdens and delays.

CONCLUSION

Because the proposed rule does not accomplish the stated goals, and actually would increase the burden placed upon the Clerk's Office, indigent defense attorneys, prosecutors, and the Courts, the petition should be denied. If the amendment did work consistently with its stated goals, the amendment would deprive attorneys of access to a certified and official version of proceedings, thereby forcing attorneys to make uncertain decisions regarding whether to file petitions. The amendment would also drastically increase the workload placed upon defense attorneys, prosecutors, and the Courts alike. Rather than possessing a version which is prima facie correct, the parties will be forced to go through the arduous process of assessing and litigating the contents of an audio/video recording and the Courts will be forced to unnecessarily determine the contents. The rule further interferes with a party's ability to file a petition for review because appellate Courts do not rely upon recordings as evidence of the contents. Transcripts will still need to be produced in the vast majority of cases because defendants are entitled to the contents of their file, including transcripts. Finally, the proposed rule injects additional delay into the system. In effect, the rule

merely deprives attorneys and Courts of transcripts at the time when it is most necessary.

RESPECTFULLY SUBMITTED this 20th day of May, 2014.

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Electronic copy filed with the
Clerk of Supreme Court of Arizona
this 20th day of May, 2014.

By /s/ Mikel Steinfeld
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