

1 ELIZABETH ORTIZ (012838)  
2 Arizona Prosecuting Attorneys'  
3 Advisory Council  
4 1951 West Camelback Road, Suite 202  
5 Phoenix, AZ 85015-3407  
6 (602) 542-7222 / FAX (602) 274-4215

7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-14-0031

10 **PETITION FOR ADOPTION,**  
11 **AMENDMENT OR REPEAL OF**  
12 **RULES 32.2(A) AND (B),**  
13 **ARIZONA RULES OF CRIMINAL**  
14 **PROCEDURE**

**COMMENT OF THE**  
**ARIZONA PROSECUTING**  
**ATTORNEYS' ADVISORY**  
**COUNCIL IN OPPOSITION**

15 Pursuant to the Arizona Rules of the Supreme Court, Rule 28(C), the  
16 Arizona Prosecuting Attorneys' Advisory Council ("APAAC") hereby submits its  
17 comments in opposition to the Petition for Adoption, Amendment, or Repeal of  
18 Rules 32.2(a) and (b), Rules of Criminal Procedure because the requested changes  
19 are unnecessary and would lead to new PCR filings by confused litigants.<sup>1</sup>

20 The Petition currently before this Court has been filed so often it is almost  
21 an annual request. This Court has previously denied similar requests in 2011 (*see*  
22

23 \_\_\_\_\_  
24 <sup>1</sup> Although the Petition is captioned to include "adoption" and "repeal" of Rules 32.2(a) and (b),  
25 the Petition only presents argument for an amendment to these rules and does not argue for their  
"adoption" or "repeal." Therefore, this comment only addresses the requested modification that  
is presented in the text of the Petition.

1 R-11-0016) and two successive requests in 2013 (*see* R-13-0003; R-13-0045,  
2 denied November 13, 2013). Now, in 2014, in a Petition that is almost identical to  
3 the one that was denied in late 2013, Petitioner again asks this court to modify the  
4 Rules of Post-Conviction Relief by specifically adding “subject matter  
5 jurisdiction” to the exceptions to preclusion. As in the previous years, this Court  
6 should deny the Petition because it is unnecessary and will waste judicial resources  
7 by forcing courts to deal with new litigation from litigants who will believe that the  
8 Court has changed the substantive law by amending this procedural rule.  
9

11 Rule 32.2(a) is a rule of preclusion that is “designed to limit review and  
12 prevent endless or nearly endless reviews of the same case in the same trial court.”  
13 *Steward v. Smith*, 202 Ariz. 446, 450, ¶ 10, 46 P.3d 1067, 1071 (2002). Rule  
14 32.2(b) exempts certain types of claims from the general preclusion rules under  
15 Rule 32.2(a). Petitioner seeks to exempt from preclusion any claims “involving  
16 subject matter jurisdiction.” [Petition at 3].  
17

19 Unlike personal jurisdiction which can be waived, subject matter jurisdiction  
20 involves a court’s authority to hear a particular type of case, and, therefore, it  
21 cannot be forfeited or waived. *State v. Flores*, 218 Ariz. 407, 409–10, ¶ 6, 188  
22 P.3d 706, 708–09 (App.2008); *see also U.S. v. Cotton*, 535 U.S. 625, 630 (2002)  
23 (holding that defects in subject-matter jurisdiction require correction regardless of  
24 whether the error was raised in the lower court.). Thus, the requested amendment  
25

1 to the rule is completely unnecessary. Indeed, because Rule 32 is a rule of  
2 procedure, the rule cannot be re-written to provide new substantive rights. Rule 32  
3 is based on A.R.S. § 13-4232 which provides the substantive authority for the  
4 Rule. Because adding Petitioner's requested language cannot add a substantive  
5 right, and because the right for review due to lack of subject matter jurisdiction  
6 already exists, the requested change is an unnecessary redundancy. Petitioner cites  
7 to no case where a valid subject matter jurisdiction claim was deemed to be  
8 precluded under the current language of Rule 32.2(b). In sum, Petitioner seeks a  
9 change to fix a problem that does not exist.  
10  
11

12 While changing a rule to add unnecessary language may be seen as a  
13 harmless folly, in reality, changing this Rule as requested would add needless  
14 litigation throughout our court system. Convicted defendants acting in *propria*  
15 *persona* file most of the successive Rule 32 actions in our system. These  
16 individuals will construe the change in terminology proposed in the amendment as  
17 a substantive change to Rule 32. They will argue, with some logical force, that  
18 there would be no reason to change the rule if it was not to add something new.  
19 Additionally, the word "jurisdiction" also causes significant confusion in the law  
20 as it is frequently used to mean different things. *See Collins v. Superior Court*, 48  
21 Ariz. 381, 393, 62 P.2d 131, 137 (1936) (explaining that "jurisdiction" is often  
22 incorrectly used to mean, "not the *power* to perform a certain act, but the  
23  
24  
25

1 performing of it when it was prohibited, a very different thing”) (emphasis in  
2 original); *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996)  
3 (“[T]he word ‘jurisdiction’ means different things in different contexts” and has  
4 been used “imprecise[ly]”); *State ex rel. Dandoy v. City of Phoenix*, 133 Ariz. 334,  
5 338-39, 651 P.2d 862, 866-67 (App. 1982) (noting that lack of jurisdiction is often  
6 confused with legal error). Given the way the term has been used it is easy to see  
7 how many litigants will misconstrue their properly precluded claim as a claim  
8 based in subject matter jurisdiction. Changing the rule will invite these litigants to  
9 file additional claims for post-conviction relief. Thus, courts will be forced to deal  
10 with needless litigation over the nature of the rule change brought by individuals  
11 who do not understand the limited scope of “subject matter jurisdiction.” For  
12 these reasons, APAAC asks this Court to deny the Petition as it has wisely done  
13 three previous times in the last five years.

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of April, 2015.

ELIZABETH ORTIZ  
Executive Director, Arizona Prosecuting  
Attorneys’ Advisory Council

By:   
ELIZABETH ORTIZ

1 Electronic copy filed with the  
2 Clerk of the Arizona Supreme Court  
3 this 27th day of April, 2015:

4  
5 By: \_\_\_\_\_

*Agnew*

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25