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In the Matter of: Petition to Add Subsection 32.13 to Rule 32 of the Arizona Rules of Criminal Procedure	No. R-15-0029 **COMMENT OF THE CITY OF PHOENIX PUBLIC DEFENDER'S OFFICE TO THE PROPOSED ADDITION OF SUBSECTION 32.13 TO THE ARIZONA RULES OF CRIMINAL PROCEDURE**

The City of Phoenix Public Defender's Office ("PD") opposes the Petition to add a new subsection, Rule 32.13, to the Arizona Rules of Criminal Procedure.

A BRIEF HISTORY OF LIMITED JURISDICTION COURTS

Limited Jurisdiction Courts developed out of the expansion of Justices of the Peace over a span of several centuries in England.[1] This model worked well for several centuries because it provided judicial authority that was familiar with the area over which they presided and they could resolve the daily disputes that arose in rural areas.[2] Eventually, the United States adopted this common law structure and started to utilize non-lawyers to

[1] *See Four Essential Elements Required to Deliver Justice in Limited Jurisdiction Courts in the 21st Century*, Conference of the State Court Administrators a Policy Paper 2013-2014.
[2] *Id.*

preside over certain legal matters.[3] At the time, this was a necessity due to the lack of trained practitioners. It proved difficult to find lawyers during the Westward Expansion and it also made sense to honor the democratic ideals being fostered at the time by utilizing laymen.[4] In addition, the law was much less complicated as was the practice-of-law.[5] Today's modern legal structure does not reflect this same common law practice. Despite these dramatic changes, courts of limited jurisdiction have continued to expand and in many ways still function in the same common law fashion. Ultimately, the fact that limited jurisdiction courts are not equipped or well-suited to deal with traditional Rule 32 processes suggests that Rule 32—as written—is actually more critical than ever in limited courts.

RELEVANT PROCEDURAL BACKGROUND

Petitioner filed a Petition to Amend Rule 32 of the Arizona Rules of Criminal Procedure on January 15, 2015. An Amended Petition was filed on April 7, 2015. The Amended Petition was purported as an attempt to incorporate "various comments from other judge and attorneys...." In particular Petitioner notes that the amended changes relate to: (1) specific page limits for the petition and State's Response, (2) additional time allotments for Rural Prosecutors; and (3) jurisdictionally based notice deadlines wherein failure to timely file is a basis to strike any Petition. These comments do not, however, address the concerns of the City of Phoenix Public Defender's Office. The City of Phoenix

[3] *Id.*
[4] *Id., supra.*
[5] *Id.*

Public Defender's Office is opposed to the Petition in its entirety and submits this Comment in opposition of this proposed Rule change.[6]

SUMMARY REPLY TO THE PROPOSED AMENDED PETITION

The new subsection would govern the procedure for seeking post-conviction relief in all courts of limited jurisdiction.[7] Petitioner states that the purpose behind the new subsection would be to "provide a fair and just outcome but to avoid a duplication of judicial resources or redundant issue resolution." The meaning of that statement is unclear as is the purpose of the Petition and need for the rule change.

It is, however, clear that the practical effect of Rule 32.13 would be to: (1) eviscerate the procedural and substantive protections codified within Rule 32 based upon Petioner's flawed premise; (2) artificially ensure that the number of limited court PCR petitions (referred to as "LCPCR") is dramatically reduced; (3) substantially and artificially weaken the effectiveness and role of defense counsel in LCPCR and further handicap *Pro Per* defendants; (4) inadvertently create additional complex litigation; (5) unconstitutionally deprive defendants in the limited jurisdiction courts equal protection under the law.

I. Rule 32.13 would completely eviscerate the procedural and substantive protections based upon a flawed premise while narrowing the window for relief and violating the Equal Protection Clause

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[6] The Petition also does not comport with the ABA Criminal Justice Section Standards for Post-Conviction Remedies which provides a suggested baseline for such remedies. *See http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_postconviction_blk.html*

[7] According to the City of Phoenix, the municipal court handles approximately 100,000 criminal charges annually for cases that range from minor traffic violations to Class 1 misdemeanors punishable by up to 180 days in jail and a $2,500.00 fine. *See https://www.phoenix.gov/court*

PETITIONER'S PREMISE IS FLAWED FROM THE OUTSET

At the outset, Rule 32.13 clarifies that the grounds for relief in these LCPCR cases would remain unchanged.[8] Yet, Petitioner immediately seeks to eliminate a host of substantive and procedural safeguards which, in present form, help to ensure due process and the right to a fair trial for limited jurisdiction defendants while also acting as a safety valve and check on the judicial authority in those same courts.[9] [10]

Here, Petitioner seeks dramatic change while necessarily conceding that the scope of Rule 32 eligible claims should remain unchanged. They do so based upon an entirely flawed premise about the nature and collateral consequences of convictions in the limited jurisdiction courts. Some of the more concerning changes are as follows, in summary form: (1) eliminate the Notice of PCR and consolidate everything into a single Petition, (2) the Petition (inclusive of the Notice) must be filed within 60 days, (3) a Petition cannot be pursued while the case is on Direct Appeal, (4) failure to move to withdraw from a plea pursuant to Rule 17.5 precludes all post-conviction relief, (5) the Petition must not exceed 18-pages inclusive of all attachments, exhibits and appendices, (6) no Reply brief shall be permitted, (7) evidentiary hearings are discretionary, seemingly disfavored and must be requested in a separate brief and (8) the motion for rehearing is totally eliminated.

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[8] *See* Rule 32.1, ARCP; *See also* Proposed Rule 32.13(a).

[9] At present the makeup of the judicial authority in the limited jurisdiction courts varies significantly. Many of the municipal courts, such as the City of Phoenix, appoint judges who must be attorneys. Some municipalities, however, do not require judges to be attorneys. Yuma, on the other hand, elects its judicial officers. At the same time, judicial officers in the justice courts are elected for 4 year terms, do not need to be an attorney and must be at least 18 years of age. *See* azcourts.gov/guidetoazcourts/LimitedJurisdictionCourts.aspx

[10] It should be acknowledged that Arizona does offer a forward-thinking and intensive training program for lawyer and non-lawyer court judges; however, the variety of legal issues with which they deal are nevertheless very complicated. *See Four Essential Elements Required to Deliver Justice in Limited Jurisdiction Courts in the 21st Century*, Conference of the State Court Administrators a Policy Paper 2013-2014.

a. Rule 32, in present form, is the only meaningful form of Appellate Review

Given the scope of the changes sought it is critical to remember that Article 2 § 24 of the Arizona Constitution provides that an accused in a criminal prosecution has the "right to appeal in all cases." Post-Conviction Relief, regardless of the type of jurisdiction or nature of the case, is the last and only form of appellate review in the majority of cases. In fact, Petitioner states that 95% of all cases are resolved via a change of plea. The Petitioner, however, fails to account for the fact that the plea agreements that follow include a specific waiver of appellate rights.[11] Ultimately, the fact that 95% of cases resolve via plea agreement is an issue that cuts against Petitioner's own position—especially in the limited jurisdiction courts.

Clearly, the decision to give up the right to direct appeal coupled with the right to trial is a monumental event in and of itself. Nevertheless, there are a host of constitutional protections that do remain preserved. These include, among many other rights, the right to effective assistance of counsel and the right to be sentenced in accordance with the law. In addition, there is no distinction regarding those rights based on the category of the offense or whether the conviction is a result of a plea or trial.[12] Ultimately, as pointed out by Petitioner, this means that 95% of defendants waive the right to direct appeal in the limited jurisdiction courts. Therefore, Rule 32 ultimately provides "the only means available for exercising the constitutional right to appellate review." *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616, supp. op., 182 Ariz. 118, 893 P.2d 1281 (1995). The scope of

[11] *See also* Rule 17, ARCP.
[12] *See* Rule 17.2, ARCP.

relief provided by Rule 32 relief must be interpreted liberally in allowance for elimination of the right to appeal following a guilty plea. *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995).

b. <u>A flawed premise for a profound Rule change</u>

Here, the spirit of Petitioner's requested rule change appears premised on the assumption that because the offenses dealt with by the limited jurisdiction courts are categorically less serious, the elimination of meaningful PCR is justified in the interests of judicial economy. This premise further presupposes that because of the categorical difference (e.g., misdemeanor vs. felony) of the violations the collateral consequences to the Defendant as well as the community are somehow lessened to an extent that the PCR process can essentially be eliminated. This is an entirely flawed premise.

A recent study estimated that between 1972 and 2006 the volume of misdemeanor cases rose from five million to more than ten million between 1972 and 2006.[13] In this regard, Florida Supreme Court Justice Gerald Kogan stated: "It is time to end the wasteful and harmful practices that have turned our misdemeanor courts into mindless conviction mills."[14] Accordingly, it is seemingly clear that the Rule 32 process is the primary protection for defendants in these limited jurisdiction courts. Yet, as presented by Petitioner, the common misconception is that the punishment and collateral consequences for misdemeanor offenses and even petty offenses are minimal. This is a flawed premise

[13] *See* Why Misdmeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts, *Univ. of California, Davis Law Review*, Vol. 45:277 (2011), by Jenny Roberts, Associate Professor American University, Washington College of Law.
[14] *Id.*

given that even the least serious lower court convictions may result in deportation, sex offender registration, loss of professional licenses, loss of public housing, loss of student loans and similar long-reaching ramifications.[15] Another problem is that in the technological age in which we live, lower court conviction records are now readily available to employers and landlords creating a financial ripple effect in our communities.[16]

The structure of the lower courts system also yields issues not seen in the Courts of general jurisdiction and these issues are most often only capable of remedy via the application of Rule 32 in its present form.[17] For example, in the lower courts, including the City of Phoenix, the volume of cases is exploding.[18] As a result, it is routine for clients to proceed without an attorney as *Pro Per* defendants, remain uncounseled and to be pressured at various points along the legal journey by a variety of state actors.[19] These Defendants are then asked to communicate directly with Prosecutors who almost unilaterally control their fate at a time when the defendant is the least shielded from the power of the State.[20] Even defendants that are eventually appointed counsel or that retain counsel often confer directly with the prosecutor prior to having representation. At the same time, the Judges are making spur of the moment and uninformed decisions for the indigent clients about their right to counsel and/or their waiver of counsel.[21] High case

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[15] *Why Misdemeanors Matter, supra.*
[16] *Id.*
[17] *See e.g., Minor Crimes, Massive Waste, The Terrible Toll of America's Broken Misdemeanor Courts,* The NACDL (April 2009).
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

volume and external pressures often result in legal issues that are only resolved through the Rule 32 process. Here, Petitioner's rule change would cripple that same process and act to artificially deny relief when the need for those protections is now at its peak.[22] This would be accomplished by creating confusion among attorneys and defendants as to applicable timelines in various courts. Experienced attorneys would be dealing with multiple deadlines and totally different statutory structures. *Pro Per* defendants would be at a distinct disadvantage. The Courts would have to re-tool various post-conviction relief publications, documents and advisements. Judges and staff would have to be re-trained.

Then, even if those timelines are recognized and acted upon, the timeline is reduced from a theoretical total of 150 days (90 for notice and 60 for Petition) to 60 days. This would encompass the time needed for a defendant to accomplish the following, among many other tasks, within 60 days: (1) identify or discover a legal issue, (2) go back to court for appointment of an attorney, (3) locate and get access to the case file, (4) make copies of the case file including CDs and other electronic media, (5) locate the Court file, (6) review the Court file, (7) contact former counsel, (8) interview former counsel, (9) interview other witnesses, (10) conduct legal research, (11) properly analyze the case file and court file, (12) obtain audio/transcripts, (13) review audio/transcripts, (14) draft a final brief identifying all issues and (15) prepare all exhibits for the brief. At the same time these tasks are being accomplished it must be recognized that Petitioner's new Rule then seeks to strike and deny jurisdiction to untimely briefs across the board. Petitioner then

[22] *See also, for discussion of similar issues, The Price of Misdemeanor Representation*, 49 Wm. & Mary L. Rev. 461 (2007), Erica J. Hashimoto.

throws in an additional hurdle by mandating that a failure to move to withdraw from a plea pursuant to Rule 17.5 precludes *all* post-conviction relief. Rule 17.5 is most commonly utilized prior to sentencing to withdraw from a plea or to correct a decision made that was premised upon a mistake or misapprehension. It is entirely separate from post-adjudication remedies that may exist in any given case which are too numerous to discuss at this time.

Nevertheless, despite all of these substantive changes, Petitioner asks to impose an 18-page-limit that is inclusive of all attachments, exhibits, appendices and other Rule 32 related requirements. The State is then afforded the same page limit in Response and additional time if needed. However, despite the initial page limitations, the Defendant is *not* afforded *any* Reply brief whatsoever. It goes without saying that a Reply to the State is a routine and expected necessity to nearly all meaningful Petitions. Nevertheless, Petitioner goes on to then further limit access to evidentiary hearings and to completely eliminate requests for rehearing. It should be noted that rehearing requests are rare in LCPCR cases; accordingly, it is unclear why that provision would be part of the Petition in the first instance especially since the only effect it would likely have would be to preclude requests in those unusual instances where it was truly warranted or a *bona fide* issue existed.

c. **The Petition will deny defendants in the lower courts equal protection under the law when compared to their similarly situated counterparts in the courts of general jurisdiction.**

As noted earlier, Petitioner points out that 95% of cases resolve via plea agreements that contain a waiver of the right to direct appeal. However, the Defendant is presently provided 90 days within which to file their Notice of Post-Conviction Relief and 60 days to file the Petition with the potential need for an extension of time depending upon the

issues and the dynamics of the case. The remainder of Rule 32 then applies as well. Here, Petitioner seeks to create an entirely different subsection of Rule 32 that applies only to this same lower court defendant. However, this new subsection, Rule 32.13, would not apply to a similarly situated Defendant who entered into a misdemeanor plea in a court of general jurisdiction such as the Maricopa County Superior Court. That Defendant would have access to relief pursuant to Rule 32 as presently enacted. This would not be equal justice under the law.

By creating two different rules—both providing the only avenue for certain forms of guaranteed appellate relief—Petitioner leaves the door open for an Equal Protection challenge to Rule 32.13. Coincidentally, the case law in this area appears to be in flux. Ultimately, it could be urged that Rule 32.13 does indeed infringe upon a fundamental right—whether it be a derivative of a right to appeal, effective assistance of counsel or access to the courts—and as a result entitled to something other than deferential review. As presently drafted, Rule 32.13 could not withstand an Equal Protection challenge even where the Court applied a deferential review standard. The reality, as discussed in this Comment, is that even if the statute is presumed to be constitutional there is simply no reasonable justification for the dramatic changes. Clearly, the proposed changes could not survive any form of heightened scrutiny.

SUPPLEMENTAL LAW, ARGUMENT AND COMMENTS TO THE SUBSECTIONS OF RULE 32.13

I. Rule 32.13 is silent as to critical portions of the current Rule which will cause confusion and create another artificial barrier to relief

The proposed addition to Rule 32 is silent on many issues such as: time limits for rulings, summary disposition, assignment of judicial officer, extensions of time, notice of completion following review by counsel, burden defendant must meet, intellectual disability determination, the Rule 32.5 declaration, distinctions regarding successive or untimely petitions, what occurs when a non-compliant petition is filed and whether a defendant may remedy the defect to name a few. [23]

II. Eliminating the notice of post-conviction relief eliminates a crucial part of the process and is a step backwards.

On, July 31, 1991, the Supreme Court appointed a 17 member committee charged with making recommendations regarding changes to Rule 32. One notable change that was proposed was the addition of the notice of post-conviction relief in lieu of defendants initially filing a petition. The change was adopted and went into effect December 1, 1992. The current rule proposal, if adopted, would return what R 92-0002 refers to as the "old system" which they deemed counterproductive and "did not insure finality for the victims of crimes."

III. A Motion to Withdraw from a Plea Agreement pursuant to Rule 17.5 is not a substitute for collateral review

The attempt to create a legal loophole resulting in denying a defendant the right to pursue post-conviction relief is inconsistent with the Arizona Constitution and United States Constitution. It is our responsibility under the Constitution to ensure that no criminal

[23] Proposed 32.13(a) states: "The grounds for relief shall be those set forth in Rule 32.1(a)" but the proposal is silent as to the remaining sections contained in the existing rule.

defendant – whether a citizen or not – is left to the "mercies of incompetent counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970).

Further, you cannot preclude someone from pursuing post-conviction relief even if they did file a Motion to Withdraw pursuant to 17.5 because the manifest injustice standard outlined in Rule 17.5 is not akin to claims that may be raised in a petition for post-conviction relief, and it is certainly not a substitute. This would especially be the case if counsel was not competent or if additional constitutional claims existed as well as any claims pursuant to Rule 32.1(b) – (h) that would not be encompassed in a Motion to Withdraw from a plea agreement. Further, a defendant can never be precluded from filing a petition grounded in claims pursuant to Rule 32.1(d)-(h).

IV. Proposed 32.13(a): Grounds; Time Limits: Preclusion.

1. The proposed subsection incorporates Rule 32.1 by reference and then proceeds to include portions of Rule 32.2 (Preclusion of Remedy) and Rule 32.4 (Commencement of Proceedings). The time frame proposed is shorter, giving only 60 days to prepare a petition for post-conviction relief as opposed to 90 days for a Notice and 60 days for the Petition following the filing of the Notice. The filing of a notice, like a notice of appeal, serves many purposes and renders the process more efficient. *See supra.*

2. Foreclosing the ability to pursue post-conviction relief while a direct appeal is pending may prolong the process and finality. The Supreme Court has pointed out potential benefit in the way of timeliness if an appeal and Rule 32 proceeding are done at the same time. Furthermore, in a given case, an early Rule 32 proceeding could make

consideration of the direct appeal moot and could hasten the start of a new trial or other resolution of the case. *Krone v. Hotham*, 181 Ariz. 364, 890 P.2d 1149 (1995).

3. Striking a petition for post-conviction relief solely because it was not filed in a timely fashion would be wholly inappropriate.[24] The claims should be addressed on the merits as barred by the time limits, claims not barred by time limitation that need to be address on the merits, or deemed precluded. The proposed subsection is silent on the striking of a non-compliant petitions (one that does not comply with Rule 32.5).

V. ADDITIONAL PROPOSED COMMENTS TO RULE 32.13

1. If a case is pending direct appeal the ability to pursue post-conviction relief is not stayed. This would be especially important in a hypothetical situation where evidence to support a claim under Rule 32.1(h) is uncovered, potentially vacating the conviction and sentence. To provide relief without undue delay these claims should be raised regardless of whether appeal is pending. A defendant is typically not advised to pursue both appeal and post-conviction relief simultaneously as he or she waives a claim of ineffective assistance of appellate counsel, but that is the defendant's choice to make.

2. The proposal states 95% of cases resolve by plea. Yes, Rule 17.5 does provide an avenue of relief if the plea does not meet constitutional standards. However, there are many other constitutional protections that are still in place and failure to seek relief pursuant to Rule 17.5 cannot preclude a defendant from pursuing the only mechanism they have to exercise their constitutional right to appellate review, even if it is not at the

[24] *See ABA Guidelines for Post-Conviction Remedies, supra.*

court of appeals. Requiring the petition be timely filed makes sense. However, a petition containing substantive claims is not at all analogous to a notice of appeal. *See Supra.*

3. The comment also attempts to ensure proper notice forms are modified. This is imperative, but the colloquy at sentencing and plea acceptance should reflect the applicable time frames, especially at sentencing since Rule 32 proceedings are a Pro Per initiated process the overwhelming majority of the time, and sentencing is the proceeding where the defendant has to be present.

VI. Proposed 32.13(b): Commencement of Proceedings; Contents; Length; Response.

1. Commencement with a substantive petition is not appropriate. *See Supra.* The current notice of post-conviction relief and petition for post-conviction relief forms can accommodate cases originating from limited jurisdiction courts as well. Making additional forms unnecessarily confuses people. Rule 32.4(a) states that the court must provide forms and the proposed subsection is silent as to this issue as well.

2. Supplemental petitions are prohibited without leave of the court. The meaning of this is unclear: does the author intend to say an amended petition (currently addressed by Rule 32.6(d)) or a supplement to the initial petition. Currently, Rule 32 proceedings and their respective pleadings do not contain supplements, only amended petitions that completely replace the initial petition filed, not add to it.

3. The State may receive an enlargement of time for good cause, but there is no provision for an enlargement of time to file a petition. Rule 32.4(c)(2) provides a mechanism by which a defendant may request an extension of time on a showing of good

cause in two places; one for counsel and later for Pro Per defendants. The rule should provide a mechanism to request an extension of time to file a petition and what must be shown (good cause, extraordinary circumstances, etc...).

4. Current Rule 32.6(a) requires the State to file a response. Permitting the State to not file a response helps prevent undue time delays. Once the response is filed, or a pleading stating that the State is intentionally not responding or taking no position, moves the Rule 32 proceeding forward. This would eliminate waiting the full response time only to make an assumption and move forward. In addition, as a practical matter, it would be difficult to imagine a scenario where the court would consider granting a petition for post-conviction relief without the State having responded.

VII. ADDITIONAL COMMENTS TO PROPOSED 32.13(b)

There are many claims resulting from what is part of the court file that may need extensive elaboration. Assuming that a Pro Per defendant will know what is already in the court file, which is uncommon; knowing how to incorporate those items by reference is even rarer. The existing rule does not require that items in the record be provided, but the items that support a claim are easier accessed for judicial efficiency if they are attached to the pleading and the judicial officer does not have to search for them. Further, the overwhelming majority of claims that result in post-conviction relief being granted are due to developing facts that were not included in the record. This ability to expand the record is unique to post-conviction relief. This goes to the next point that the 18 page limit should not include all attachments, exhibits and any appendices – this negates the unique beauty of Rule 32 and the expansion of the record to include claims/evidence not presented.

VIII. Proposed 32.13(c): Limited Transcript Use; Right to Court Appointed Counsel Conditional on Original Charges.

1. The Ability to utilize AV disc for proceedings less than 90 min is not a new ability. Local Rule 9.4: Record on Appeal, in pertinent part subsection 9.4(b) states: "The verbatim record in limited jurisdiction courts may consist of audio, video, digital, transcription, or other method of recording as approved by the Supreme Court. Verbatim records of ninety (90) minutes or more in total length or duration must be transcribed into a written format." That is for limited jurisdiction court appeals. Noting that the use of AV discs in a Rule 32 proceeding in limited jurisdiction courts would be appropriate, especially since lower court appeals is using this format now. However, this can easily be accomplished by adding to current Rule 32.4(d), which covers transcripts of proceedings as there are proceedings that may require transcripts to be prepared.

2. Counsel should be its own section. Once you file a notice if you were entitled to counsel during the trial phase you would be entitled to counsel during PCR, another reason the notice is so important. Requiring defendant's to submit a motion to request counsel will only increase the length of time it will take the proceeding to come to finality, but will also generate more pleadings. Further, a pleading defendant is constitutionally entitled to effective assistance of counsel on his first of-right petition for post-conviction relief, the counterpart of direct appeal. *State v. Perry*, 225 Ariz. 369, 238 P.3d 637 (App. 2010).

Where, under state law, ineffective assistance of trial counsel claims must be raised in an initial collateral review proceeding (like in Arizona), a procedural default will not bar a

federal habeas court from hearing those claims if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). Recognizing that very few, if any, limited jurisdiction court cases would even make their wait to the federal level, does not change the spirit of the rule or the United States Supreme Court's decision. Unless the notice affirmatively declines counsel, if a defendant was entitled to counsel during the trial phase one should be appointed. Another reason the notice is such a crucial and time saving pleading.

Arizona, even prior to *Martinez*, recognized the importance of effective assistance of post-conviction relief counsel. Ariz. R. Crim. P. 32.4 entitles an indigent defendant to appointment of counsel for defendant's second, timely filed post-conviction proceeding, so that the defendant may investigate and possibly bring a claim that in defendant's first, "of-right" PCR proceeding, his counsel provided ineffective assistance. *Osterkamp v. Browning*, 226 Ariz. 485, 250 P.3d 551 (App. 2011).

IX. ADDITIONAL COMMENTS TO PROPOSED RULE 32.13(c)

1. If a defendant was not entitled to counsel due to the exposure the charges filed carry then there is basis to deny counsel during the Rule 32 proceeding, but making an extra step (which is another result of eliminating the notice) for the defendant's in a Pro Per initiated process who is entitled to counsel seems to create more paperwork and be less efficient.

2. The proposed subsection says nothing about the time frames regarding the petition due date if counsel is appointed, or whether time spent obtaining transcripts tolls the time for the petition due date.

X. Proposed 32.13(d): Oral Argument and Evidentiary Hearings.

1. This entire section should be eliminated. To state a colorable claim a defendant must allege specific facts which would allow a court to meaningfully assess why that deficiency was material to the plea decision. To achieve a hearing, a defendant must present more than a conclusory assertion that counsel failed to adequately communicate the plea offer or the consequences of conviction. A petition need not prove detailed evidence, but must provide specific factual allegations that, if true, would entitle him to relief. *State v. Donald*, 198 Ariz. 406, 10 P.3d 1139(App. 2000), review denied; *State v. Bowers*, 192 Ariz. 419, 966 P.2d 1023 (App. 1998), review denied.

The assessment of whether a colorable claim has been presented, and then whether an evidentiary hearing is needed to substantiate/support/verify any of the claims alleged in the petition should be in the discretion of the judicial officer. Every defendant will request a hearing if the Rule permits for it. This will create extra pleadings that will need to be ruled on in the majority of cases, and take from the judicial officer what his or her duty is.

2. Current Rule 32.6(c) gives specific direction on this issue stating the court must review the petition and other documents within 20 days after the defendant's reply was due. First, the court identifies all claims that are procedurally precluded. Second, the court determines whether any of the remaining claims present a material issue of fact or law that would entitle the defendant to relief. If the court determines none of the remaining claims present a material issue of fact or law and that no purpose would be served by any further proceedings, the petition must be summarily dismissed. If the court determines that

one or more of the remaining claims present a material issue of fact or law, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law.

XI. ADDITIONAL COMMENTS TO PROPOSED RULE 32.12(d)

This section is not based in reason. Although the proposal is correct in that the defendant has the burden to identify grounds for an evidentiary hearing that will genuinely advance the content of the petition—that is what they are doing with the petition. The best way to ensure that people are not embarking on fishing expeditions is to leave the current process, which leaves whether an evidentiary hearing is set in the discretion of the judicial officer.

Many limited jurisdiction court matters result in written pleas, just like superior court. Further, the content and issues the court will permit evidence to be presented on are limited by the court in the initial minute entry setting the evidentiary hearing, or determined by utilizing the informal status conference to ensure that a case is not being re-litigated. In fact, defendants are currently precluded from re-litigating such claimed trial errors unless counsel's failure to raise the issue is so egregious as to constitute ineffective assistance. *State v. French*, 198 Ariz. 119, 7 P3d 128 (App. 2000). If after review of a petition a ruling is made and an evidentiary hearing is not set the judicial officer may indicate a hearing was not warranted or necessary based on the claim(s) raised.

XII. Proposed 32.13 (e): Summary Disposition; No Motion for Rehearing; Format; Distribution; Notices.

1. There are no time frames in which the court must rule. This would permit Rule 32 proceedings to languish without ruling leaving all parties and victims involved with no expectations as to when finality may occur.

2. There is no other petition or motion in criminal or any other area that can be thought of where asking the court to reconsider its ruling is not permitted. Further, forcing every potential error or issue or oversight to the appellate court is not the most efficient way to handle many issues that the trial court may be able to resolve on its own with ease.

XIII. ADDITIONAL COMMENTS TO PROPOSED RULE 32.13(e)

Referring to the nature and alleged mitigated consequences of misdemeanors and petty offenses does not change constitutional protections of those who bear the weight of the State against them. The Petition and Amended Petition fail to set forth sufficient legal or policy based reasons to support the assertion that the changes are needed to prevent undue expense or delay or inefficient use of judicial resources or how the current Rule causes these issues.

CONCLUSION

For the reasons stated above, the City of Phoenix Public Defender's Office is opposed to the proposed addition of subsection 32.13.

RESPECTFULLY SUBMITTED this 19th day of May, 2015.

CITY OF PHOENIX, PUBLIC DEFENDER'S OFFICE

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