

Hon. Michael J. Brown, Chief Judge  
Arizona Court of Appeals, Division One  
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**IN THE SUPREME COURT OF ARIZONA**

In the Matter of	)	Arizona Supreme Court
	)	No. R-15-0028
PETITION TO AMEND RULE 31.5,	)	
ARIZONA RULES OF CRIMINAL	)	AMENDED
PROCEDURE	)	PETITION TO AMEND
	)	RULE 31.5, ARIZONA RULES
_____	)	OF CRIMINAL PROCEDURE

Pursuant to Rule 28, Rules of the Arizona Supreme Court, Petitioner asks the Court to adopt amendments to Rule 31.5, Arizona Rules of Criminal Procedure, as proposed in the Attachment hereto. The proposal is intended to address the Arizona Supreme Court’s opinion in *Coleman v. Johnsen, et al.*, 235 Ariz. 195, 330 P.3d 952 (2014), which held that the Arizona Constitution guarantees the right to self-representation on appeal, but that “defendants must give notice of their intent to exercise that right within thirty days of the filing of the notice of appeal.” *Coleman*, 235 Ariz. at 196, ¶ 1, 330 P.3d at 953.

The proposal first modifies the title of Rule 35.1, from “Appeals by indigents” to “Appointment of counsel for appeal; waiver of right to appellate counsel.” It also

adds paragraphs (e), (f), and (g) to Rule 31.5:

- Paragraph (e) provides for appointment of new counsel by either the trial court or the court of appeals if the defendant's counsel withdraws.
- Paragraph (f) sets forth the process for waiver of the right to counsel. It requires filing of a written notice of waiver no later than thirty days after filing of the notice of appeal. This provision contemplates that the notice of waiver be filed in the trial court either before a notice of appeal is filed, or with the notice of appeal, and in the court of appeals if filed within thirty days after the notice of appeal is filed. In either event, the trial court will make the determination whether the defendant knowingly, intelligently, and voluntarily waives the right to appellate counsel. This conforms to the language in *Coleman*, 235 Ariz. at 199-200, ¶ 19, 330 P.3d at 956-57 in which the court stated that, "If a request is made before the filing of a notice of appeal, the trial court shall conduct a hearing to determine whether the defendant's waiver of counsel on appeal is made knowingly, intelligently, and voluntarily, just as the court would if the request for self-representation were made at trial. See *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 2540 (1975) (full citation added); Ariz. R.Crim. P. 6.1(c). If the request is made after the filing of the notice of appeal, the court of appeals must

revest jurisdiction in the trial court pursuant to Arizona Rule of Criminal Procedure 31.17(a) to conduct this *Faretta*-like hearing.” The proposed rule also provides for the appointment of advisory counsel.

- Paragraph (g) permits a defendant to file a notice of withdrawal of a waiver of the right to appellate counsel at any time, but doing so does not entitle the defendant to repeat any proceeding that has been previously held or waived. The proposed rule is consistent with Arizona Rule of Criminal Procedure 6.1(e), which provides that “A defendant may withdraw a waiver of his or her rights to counsel at any time.” The Comment to Rule 6.1(e) rule states “The defendant can decide at any time that he was mistaken to waive counsel,” adding “The defendant’s right to withdraw a waiver of counsel is unlimited.” The proposed rule will avoid having two different standards applicable to withdrawing the waiver of the right to counsel depending upon when the withdrawal is attempted and will assure a defendant that if he or she believes in hindsight that the decision to waive counsel was an ill-advised decision, the defendant will have an opportunity to withdraw the waiver.

The Court of Appeals, Division One, agrees with the Comment filed by the Arizona Attorneys for Criminal Justice that a change to Rule 26.11 requiring the trial court to advise defendants of the deadline to file a notice of waiver, and a change to Form 23 advising defendants of this deadline, are appropriate. However, the court is

of the opinion that any change to Form 23, paragraph 4, should mirror the relevant language in the proposed amendment to Rule 31.5(f).

Petitioner respectfully requests that the Court adopt the proposed amendments as reflected in the Attachment to this Petition.

DATED this \_\_\_ day of November, 2015.

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Michael J. Brown, Chief Judge  
Arizona Court of Appeals, Division One

**ATTACHMENT\***

**ARIZONA RULES OF CRIMINAL  
PROCEDURE**

\* \* \*

**Rule 31.5. ~~Appeals by indigents~~ Appointment of counsel for appeal;  
waiver of right to appellate counsel**

**a.-d.** [No change in text.]

**e. Appointment of Counsel.** If a defendant's appointed counsel is permitted to withdraw, the trial court or Appellate Court shall appoint new counsel for a defendant legally entitled to such representation on appeal.

**f. Waiver of Right to Counsel.** A defendant may waive the right to appellate counsel by filing a written notice no later than thirty days after filing of the notice of appeal. If the notice of waiver is given before the notice of appeal is filed, or is filed with the notice of appeal, it must be filed in the trial court. If the notice of waiver is given after the notice of appeal is filed, it must be filed in the Appellate Court. If the trial court determines that the defendant knowingly, intelligently, and voluntarily desires to waive the right to appellate counsel, the defendant shall be allowed to represent himself or herself on appeal. When a defendant waives the right to appellate counsel, the court may appoint advisory counsel during any stage of the appellate proceedings. Advisory counsel shall be given notice of all matters of which the defendant is notified.

**g. Withdrawal of Waiver.** A defendant may withdraw a waiver of the right to appellate counsel at any time by filing written notice of such withdrawal. The defendant will not be entitled to repeat any proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel.

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\* Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.