

MARK BRNOVICH
Attorney General
Firm State Bar No. 14000

Dominic Draye
Solicitor General
State Bar No. 033012
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-8255
Fax: (602) 542-8308
solicitorgeneral@azag.gov

ARIZONA SUPREME COURT

In the Matter of

PETITION TO AMEND THE
ARIZONA RULES OF CRIMINAL
PROCEDURE

No. R-17-0002

COMMENT OF THE
ARIZONA ATTORNEY GENERAL

Pursuant to Supreme Court Rule 28, the Arizona Attorney General hereby provides comments to the request in Petition No. R-17-0002.

I. Introduction: The Attorney General's Interest

The Attorney General serves as the chief legal officer for the State of Arizona and the Attorney General's Office (AGO) is the largest law office in the State. The AGO prosecutes certain criminal cases, including all felony conviction appeals in the state. Therefore, the AGO has a paramount interest in the promulgation and application of procedural rules impacting the practice of criminal law in the State of Arizona. In that capacity, the Arizona Attorney General

submits the following comments regarding the Petition filed by the Task Force on the Arizona Rules of Criminal Procedure (Task Force) to restyle, simplify, and clarify the language of the existing criminal rules, and to make procedural and substantive changes to promote the just resolution of criminal cases.

II. Proposal Regarding Rule 7.2

Rule 7.2(c) governs a defendant's right to release after conviction. The proposed rule—which is consistent with the current rule—provides that after conviction of an offense for which the person will, in all reasonable probability, receive a sentence of imprisonment, the court may not release the person on bail or on the person's own recognizance unless “the court finds that reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in a post-conviction proceeding[.]” *See* Proposed Ariz. R. Crim. P. 7.2(c)(1)(A)(i). The proposed rule also adds a second provision, which would permit the superior court to release a person if the parties stipulate and the court approves the stipulation. *See* Proposed Ariz. R. Crim. P. 7.2(c)(1)(A)(ii).

The AGO urges the Court to reject subsection (i) of the proposed rule (*i.e.*, the above-quoted language) and replace it with the following: “the court finds upon investigation that the defendant is in such physical condition that continued confinement would endanger his life.” This proposed language mirrors the

applicable statute, A.R.S. § 13–3961.01. Significantly, in *State v. Hawkins*, 140 Ariz. 88, 88–90 (App. 1984), the Arizona Court of Appeals concluded that the language of proposed Rule 7.2(c)(1)(A)(i) conflicts with A.R.S. § 13–3961.01 and held that the statute prevails over the rule because it addresses a substantive matter—*i.e.*, “the right to remain free pending appeal.” *Hawkins*, 140 Ariz. at 90. The Arizona Court of Appeals further held that in the absence of a finding that confinement would endanger the defendant’s life, the court lacked authority to order the defendant’s release. *Id.* Accordingly, the AGO recommends that the Court replace the language of Rule 7.2(c)(1)(A)(i) proposed by the Task Force with language that comports with the statute and interpretive case law.

III. Proposal Regarding Rule 17

The Task Force recommends substantive and stylistic changes to Rule 17, which governs “Pleas of Guilty and No Contest.” Current Rule 17.2 states, “Duty of court to advise of defendant’s rights and of the consequences of pleading guilty or no contest, or of admitting guilt, *or of submitting on the record.*” Ariz. R. Crim. P. 17.2 (emphasis added). Yet current Rule 17.2 does not delineate the rights which are waived by submission of the case to the court or of which a defendant must be informed. *See id.* The AGO urges the Court to add provisions to proposed Rule 17 clarifying that defendants retain the option to submit the determination of guilt or innocence to the court on the record.

The Task Force’s Rule-by-Rule Analysis (Appendix B) is silent on whether its proposed changes to Rule 17 intended to eliminate this option. In light of the Task Force’s general principles and its directive to clarify the language of the rules and incorporate interpretive case law, the AGO urges the Court to add provisions regarding submissions on the record and a court’s duty to advise the defendant of the rights and consequences of a submittal. *See State v. Avila*, 127 Ariz. 21, 23–25 (1980) (rejecting “the submission tantamount to a guilty plea doctrine” and listing six “warnings which must be afforded the submitting defendant”); *State v. Allen*, 223 Ariz. 125, 128, ¶¶ 15–17 (2009) (reaffirming *Avila* and “once again reject[ing] the ‘tantamount to’ or ‘functional equivalent of’ a guilty plea standard” in the context of holding that no colloquy is required under Rule 17 or *Boykin v. Alabama*, 395 U.S. 238 (1969), when a defendant stipulates to elements of an offense in a jury trial).

IV. Proposal Regarding Rule 31.8

Rule 31.8 governs the record on appeal. The Task Force recommends in proposed Rule 31.8(b)(1)(B)(ii) that the record on appeal be expanded in noncapital cases to include a certified transcript of “all trial proceedings, excluding the record of voir dire unless a party specifically designates it.” Under current Rule 31.8(b)(2)(ii), “opening and closing arguments of counsel shall not be included unless specifically designated by a party.” Ariz. R. Crim. P. 31.8(b)(2)(ii).

The AGO supports the Task Force’s proposal to modify this rule by including transcripts of opening statements and closing arguments of counsel in the record on appeal. As the Task Force correctly notes, opening statements and closing arguments are generally relevant and important in addressing issues raised on appeal, and parties invariably request that these proceedings be transcribed. (See Appendix B, at 51–52.)

V. Proposal Regarding Rule 32.9

Rule 32.9 governs the procedures and requirements applicable to appellate review of a trial court’s decision on a petition for post-conviction relief. In proposed Rule 32.9(c)(5)(A), the Task Force recommends retaining a current provision stating, “The petition or cross-petition must not incorporate any document by reference, except the appendix.” The AGO urges the Court to modify the quoted language to state instead, “The petition or cross-petition must not incorporate any document by reference,” or to delete this provision altogether. This would simplify the rule and promote consistency with proposed Rule 32.9(c)(4)(B), which describes the contents of a petition or cross-petition for review and requires a statement of material facts with “specific references to the record for each material fact.” Notably, Rule 31 of the Rules of Criminal Procedure, which governs appeals, does not permit incorporation by reference in

appellate briefs. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. West*, 238 Ariz. 482, 497, n.10 (App. 2015).

Further, it is undesirable to permit parties to incorporate documents by reference. Allowing the parties to do so improperly suggests that they can disregard the requirements enumerated under proposed Rule 32.9(c)(4)(B), describing the contents of a petition or cross-petition for review.

VI. Conclusion

In sum, the Attorney General: (1) objects to the Task Force's proposed Rule 7.2(c)(1)(A)(i) because it is inconsistent with Arizona law regarding a defendant's right to release pending appeal; (2) objects to proposed Rule 17 to the extent that it appears to eliminate submittal of cases on the record as an alternative to a guilty or no contest plea, and is therefore inconsistent with Arizona law; (3) supports the Task Force's proposed Rule 31.8(b)(1)(B)(ii) to include transcripts of opening statements and closing arguments in the record on appeal; and (4) objects to the Task Force's proposed Rule 32.9(c)(5)(A), which allows parties to incorporate documents by reference that are contained in an appendix to a petition or cross-petition for review.

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DATED this 8th day of March, 2017.

MARK BRNOVICH
Arizona Attorney General

/s/ Dominic Draye
Dominic Draye
Solicitor General