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IN THE ARIZONA SUPREME COURT

In the Matter of,

PETITION TO AMEND THE
ARIZONA RULES OF CRIMINAL
PROCEDURE

ARIZONA SUPREME COURT
No. R-17-0002

INITIAL COMMENTS TO PETITION
TO AMEND THE ARIZONA RULES
OF CRIMINAL PROCEDURE

The Task Force on the Arizona Rules of Criminal Procedure proposes amending the Arizona Rules of Criminal Procedure “to restyle, simplify, and clarify the language of the existing rules.” Pet. at 1. The proposed amendments also include “procedural and substantive changes to promote the just resolution of criminal cases.” *Id.* The Office of the Federal Public Defender (“FPD”) and the Arizona Capital Representation Project (“ACRP”) have reviewed the proposed changes and offer the following comments.

Introduction

The Capital Habeas Unit of the FPD provides representation in federal habeas corpus cases to persons who have been sentenced to death after state court proceedings and whose convictions have proceeded through the state court appellate process. The ACRP is a non-profit legal service organization that assists indigent persons facing the death penalty in Arizona. Both the FPD and the ACRP advocate on behalf of the criminally accused or convicted with a core mission of protecting the rights of their clients and safeguarding the integrity of the federal and state criminal justice systems. Both organizations have a compelling interest in the proposed changes to the Arizona Rules of Criminal Procedure to ensure that our clients’ statutory and constitutional rights are protected.

As an initial matter, the FPD and the ACRP emphasize that the failure to comment on all proposed changes (or to suggest further changes) is not an

endorsement of the content of the current or proposed rules. The Task Force should certainly be commended for undertaking amendment of the entire set of rules. Given the size of this undertaking, the FPD and the ACRP simply aim to point out the potential effects of some relevant and apparent changes. Respectfully, this comment should not be construed as addressing every change, endorsing those changes left unaddressed, or endorsing any of the Task Force's comments or characterizations of those changes. Suggested additions are noted in bold type by underscoring the added language and suggested deletions are indicated in bold type by striking out the proposed language.

I. Concerns Related to Substantive Changes and Suggestions for Clarification

Several of the proposed amendments result in substantive changes or require additional clarification.¹ Concerns related to several substantive changes and suggestions for further clarification are detailed below.

Rule 6.1. The Task Force has proposed certain amendments to Rule 6.1(e), including that “the fact that counsel is later appointed or retained does not establish a basis for repeating any proceeding previously held or waived.” App. A, Rule 6.1(e). Current Rule 6.1(e) provides that a proceeding will not be repeated “*solely* on the grounds of the subsequent appointment of counsel.” Ariz. R. Crim. P. 6.1(e)

¹ Not all of the substantive changes are identified as such as in Appendix B to the Petition to Amend.

(emphasis added). The FPD and the ACRP suggest adding “alone” or an alternative qualifier simply to clarify that the court would still have the discretion to repeat proceedings that had been previously waived or held, if necessary or desirable after the appointment of counsel. For example, “But the fact that counsel is later appointed or retained does not alone establish a basis for repeating any proceeding previously held or waived.” The Task Force does not address this as an intended substantive change. See App. B, Rule 6.1.

Rule 6.8. The Task Force has proposed various amendments to Rule 6.8. The FPD and the ACRP do not encourage any changes that would result in difficulty finding counsel who meet the requirements, thereby delaying appointment. However, the FPD and the ACRP support any amendments that heighten the standards of qualifications for appellate counsel, thereby ensuring a higher quality of appellate representation for defendants.

The proposed comment to Rule 6.8(a) states that, “The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) is a compendium of effective capital representation practices.” The FPD and the ACRP recommend the comment encompass both the 2003 ABA Guidelines and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. Further, the word “compendium” does not accurately describe the purpose of the 2003 and 2008

ABA Guidelines, nor simplify the language of the existing rules. *See* App. B, Rule 6.8(b). The FPD and the ACRP recommend that the comment to the rule read, “The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) **and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases** ~~is a compendium of~~ **collect the current consensus on** effective capital defense representation practices. . . .”

Rule 9.1. Proposed Rule 9.1 removes the word “personal” when referring to the fact of a defendant’s notice of a proceeding for purposes of an implied waiver. The FPD and the ACRP are concerned that this will create confusion in cases where the defendant’s counsel received notice, but the defendant did not. The FPD and the ACRP suggest retaining the word “personal” in the Proposed Rule to avoid confusion: “The court may infer that a defendant’s absence is voluntary if the defendant had **personal** notice of the date and time of the proceeding, notice of the right to be present, and notice that the proceeding would go forward in the defendant’s absence.” The Task Force does not seem to have intended to remove the requirement of personal notice. *See* App. B, Rule 9.1.

Rule 15.1(f)(2). The Task Force proposes a substantive change to Rule 15.1(f)(2). Proposed Rule 15.1(f)(2) narrows the categories of law enforcement agencies to which the State’s disclosure obligations apply. The Current Rule

includes “any law enforcement agency that has participated in the investigation of the case.” Ariz. R. Crim. P. 15.1(f)(2). The proposed amendment to the Rule specifies “any *state, county, or municipal* law enforcement agency that has participated in the investigation.” App. A, Rule 15.1(f)(2) (emphasis added). The proposed amendment unnecessarily limits the agencies that are subject to the disclosure requirements. For example, this revision would specifically exclude any tribal law enforcement agencies.

While the FPD and the ACRP understand that certain law enforcement agencies may not be subject to the same disclosure requirements as others, they are nevertheless concerned that the proposed revisions will result in a failure to disclose relevant evidence under the limits of the Arizona Rules of Criminal Procedure and prevent adequate judicial review. While the Task Force purports to incorporate *State v. Briggs*, 112 Ariz. 379, 383, 542 P.2d 804, 808 (1975) into Rule 15.1(f)(2), *see* App. B, Rule 15.1, *Briggs* was based on a fact-specific determination regarding a particular piece of evidence. The application of *Briggs* and any issues regarding disclosure must be addressed on the facts of each case by a judge who can make the necessary fact-specific determinations regarding agency disclosure obligations. Judicial review of disclosure issues also ensures the preservation of the record for appellate review and is thus a preferable means for resolving those issues at the trial court level.

Rule 16.2(c)(4). Proposed Rule 16.2(c)(4) removes the requirement that the court inform the defendant that the fact that he or she testified at a pretrial hearing will not be disclosed to the jury. The Current Rule requires that the court provide such information. *See* Ariz. R. Crim. P. 16.2(a)(4). The FPD and the ACRP suggest retaining the Current Rule’s content to avoid a substantive change. For example, “the defendant’s testimony at the hearing, **including the fact that such testimony occurred**, will not be disclosed to the jury unless the defendant testifies at trial concerning the same matters.” The Task Force does not seem to have intended to make a substantive change to this provision. *See* App. B, Rule 16.2.

Rule 17.4(g). Proposed Rule 17.4(g) allows a defendant to exercise a change of judge under Rule 10.2 after the withdrawal of a plea only “if the defendant has not previously exercised that right.” This proposed amendment appears to substantively change Current Rule 17.4(g), which provides “If a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself, but no additional disqualification of judges under this rule shall be permitted.” Ariz. R. Crim. P. 17.4(g). The Current Rule does not prohibit a change of judge following the withdrawal of a plea even if a prior change of judge occurred under Rule 10.2. The Proposed Rule creates a substantive change by inserting this prohibition. The following modification would address this issue: “A defendant who withdraws a plea after a presentence report is

submitted may exercise a change of judge as a matter of right ~~under Rule 10.2 if the defendant has not previously exercised that right~~, but no additional disqualification of judges under this rule shall be permitted.”

Rule 21.3(b). Proposed Rule 21.3(b) provides, “[i]f a party does not make a proper objection, appellate review is limited to a review for fundamental error only.” The standards of appellate review are not noted in other areas of the rules, and the application of those standards should be left to the appellate court to decide on a case-specific basis. This issue can be eliminated by striking the final sentence of Proposed Rule 21.3(b): “Any objection to the court’s giving or failing to give any instruction or a form of verdict must be made before the jury retires to consider its verdict. The objection must be on the record and distinctly state the matter to which the party objects and the grounds for the objection. ~~If a party does not make a proper objection, appellate review is limited to a review for fundamental error only.~~”

Rule 21.4(a). Proposed Rule 21.4(a) requires the court, at the request of a party, to submit a form of verdict to the jury for lesser included offenses and attempts. Under the Proposed Rule, a Court’s obligation to provide verdict forms is only triggered by the request of a party. Proposed Rule 21.4 derives from Rule 23.3 in the current Arizona Rules of Criminal Procedure. *See* App. B, Rule 21.4. Under Current Rule 23.3, courts have a duty to provide forms of verdict for lesser

included offenses and attempts, whether or not requested by a party. *See* Ariz. R. Crim. P. 23.3 (“Forms of verdicts shall be submitted to the jury for all offenses necessarily included in the offense charged, an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense.”); *see also Beck v. Alabama*, 447 U.S. 625 (1980) (noting the settled precedent entitling a defendant to a lesser included offense instruction if the evidence would support it and concluding that a sentence of death may not be imposed when the jury was not permitted to consider guilt of a lesser included noncapital offense that the evidence would have supported). Altering Proposed Rule 21.4(a) as follows would avoid eliminating the court’s independent obligation: ~~“On request by any party and if~~ supported by the evidence, the court must submit forms of verdicts to the jury for:” The Task Force does not seem to have intended any substantive change to this Rule. *See* App. B, Rule 21.4.

Rule 26.6(a). Proposed Rule 26.6(a) limits the disclosure of reports to those “concerning the defendant.” The Task Force does not seem to have intended a substantive change that would limit the types of reports subject to disclosure. *See* App. B, Rule 26.6(a). The FPD and the ACRP suggest altering the proposed language to include all relevant disclosure covered by the Current Rule. Specifically, the FPD and the ACRP suggest clarifying the proposed rule as follows: “The court must permit the State, defense counsel, and a self-represented

defendant to review all presentence, diagnostic, and mental health reports **concerning the defendant.**”

Rule 31.23(a)(2). Proposed Rule 31.23(a)(2) identifies the incorrect appellate court for the filing a petition for review in a capital case. Under the current framework, the petition for review in a capital case is filed directly in the Arizona Supreme Court. The proposed amendment provides for the issuance of a warrant of execution where “the defendant has not filed a petition for review with the Court of Appeals.” The proposed amendment would create confusion in proceedings in capital cases. The FPD and the ACRP suggest the following change to Proposed Rule 31.23(a)(2): “the defendant has not filed a petition for review with the ~~Court of Appeals~~ Arizona Supreme Court seeking review of a superior court denial of the defendant’s first Rule 32 petition for post-conviction relief and the time for filing a petition for review has expired”

Rule 32.4(a)(4)(A). Proposed Rule 32.4(a)(4)(A) may also add confusion to capital case proceedings. In capital cases, the Arizona Supreme Court clerk issues the notice of post-conviction relief. Ariz. R. Crim. P. 32.4(a); *see also* Proposed Rule 32.4(a)(2)(B). Proposed Rule 32.4(a)(4)(A) provides direction for a superior court clerk upon receiving a notice of post-conviction relief “from a *defendant*.” (Emphasis added). To avoid confusion, the FPD and the ACRP suggest accounting for the current procedure: “Upon receiving a notice from a defendant or the

Arizona Supreme Court, the superior court clerk must file it in the record of each original case to which it pertains and promptly send copies to the defendant, defense counsel, the prosecuting attorney's office, and the Attorney General."

Rule 32.4(b)(2). Proposed Rule 32.4(b)(2) provides for the appointment of counsel in noncapital cases "[n]o later than 15 days after the timely filing of a notice of a defendant's first Rule 32 proceeding" Under Current Rule 32.4(c)(2), counsel is appointed within 15 days of the filing of a "timely *or* first notice in a Rule 32 proceeding." Ariz. R. Crim. P. 32.4(c)(2) (emphasis added); *see also Osterkamp v. Browning*, 226 Ariz. 485 (Ariz. Ct. App. 2011) (relying on the disjunctive use of "timely or first" to hold that defendants are entitled to counsel on successor post-conviction petitions challenging initial post-conviction counsel's representation). The proposed amendment appears to create ambiguity and potentially eliminate the appointment of counsel in cases where a first petition is untimely. The Task Force does not seem to have intended this substantive change. *See* App. B, Rule 32.4. To avoid such a substantive change, the FPD and the ACRP suggest altering Proposed Rule 32.4(b)(2) as follows: "No later than 15 days after the ~~timely~~-filing of a notice of a defendant's **timely or** first Rule 32 proceeding."

Rule 32.5(b). Proposed Rule 32.5(b) extends the page limits for post-conviction petition briefs: in capital cases the petition and response would be

limited to 44 pages, with a reply limited to 22 pages; and in non-capital cases the petition and response would be limited to 28 pages, with a reply limited to 11 pages. The Task Force proposes this increase in page limits to account for increases in the typeface requirements in other rule provisions. See App. B, Rule 32.5. The FPD and the ACRP are concerned that both the current and the proposed page limitations are too restrictive and do not reflect the current practice. In capital post-conviction cases, courts routinely grant motions allowing petitioners to greatly exceed the current page limits. Current practice has shown that a page limit of 44 pages is inadequate to allow the defendant in a capital case to raise all legal and factual bases for his or her claims. To the extent the Task Force intends to amend the rules to conform with actual practice, the ACRP recommends the rule read: “In capital cases, the petition must not exceed 100–44 pages. The State’s response must not exceed 100–44 pages, and defendant’s reply must not exceed 75–22 pages.”

Rule 32.5(e). Proposed Rule 32.5(e) provides that if a defendant files a petition that does not comply with the rules, the court will return the petition to the defendant with an order specifying how the petition fails to comply. Under the proposed amendment to this provision, the defendant “has 30 days *after that order is entered* to revise the petition to comply with this rule, and to return it to the court for refiling.” App. A, Rule 32.5(e) (emphasis added). The Current Rule requires a

defendant to return a revised petition “within 30 days after *defendant’s receipt* of the non-complying petition.” Ariz. R. Crim. P. 32.5 (emphasis added). Because the proposed amendment begins the time period for refiling from the date of the court’s order, rather than the date the defendant receives the order, the proposed amendment could result in much shorter periods for revision for unrepresented defendants, who may not receive the order until after much of the 30-day time period has elapsed.

The Task Force does not seem to have intended to shorten the deadline for refiling in this way. See App. B, Rule 32.5. The FPD and the ACRP thus suggest revising the language to “The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 30 days after that order is **received**~~entered~~ to revise the petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 30 days, the court may dismiss the proceeding with prejudice. The State’s time to respond to a refiled petition begins on the date of refiling.”

Rule 39(c)(1). The last sentence of proposed Rule 39(c)(1) provides “[t]his rule does not apply to victim impact statements made in capital cases.” From this language, it is unclear whether all or part of Rule 39 does not apply in this context. The FPD and the ACRP suggest that the proposed rule be clarified as follows:

“This **subsection of Rule** ~~rule~~ 39 does not apply to victim impact statements made in a capital case under A.R.S. § 13-752(R).”

II. Concerns Related to Changes from Mandatory to Permissive Language

In several instances, the Task Force proposes changing mandatory language to permissive language by replacing the word “shall” with “may.” While many of these changes reflect appropriate discretion or remove ambiguity, the FPD and the ACRP are concerned that some of these proposed revisions will result in substantive changes or confusion. In each of the following instances, the original language was “shall.” To avoid a substantive change or the possibility of ambiguity, the FPD and the ACRP suggest the following changes:

- **Rule 12.7(b):** “If the grand jury returns an indictment, the foreperson’s record of the vote must be transcribed by the court reporter and filed with the court no later than 20 days after the return of the indictment, and ~~may~~**must** be made available only to the court, the State, and the defendant.”
- **Rule 12.7(c):** “The court reporter’s record of grand jury proceedings must be transcribed and filed with the superior court clerk no later than 20 days after return of the indictment, and ~~may~~**must** be made available only to the court, the State, and the defendant.”

- **Rule 13.2:** “If the State fails to file a timely information, a court ~~may~~must dismiss the information if the defendant files a motion seeking that relief under Rule 16.1(b).” The Task Force’s proposed change to permissive language in this provision would add discretion where none previously existed.
- **Rule 13.4:** “On motion or on its own, a court ~~may~~must order a severance of counts, defendants, or both, if necessary to promote a fair determination of any defendant’s guilt or innocence of any offense.” As proposed, a court could find that severance is necessary to promote a fair determination of guilt or innocence, yet decide not to sever. Given the Rule’s prior language, the decision to sever is not discretionary if a court determines that severance is necessary to promote a fair determination of guilt or innocence.
- **Rule 15.2(a)(1)(H):** “. . . submit to a reasonable physical or medical inspection of the defendant’s body, but such an inspection ~~may~~must not include a psychiatric or psychological examination.” While “must not” and “may not” both prohibit action, the limitation on examinations requires the stronger mandatory language that it is afforded in the current rules.

- **Rule 18.5(d):** “Upon request, the court ~~may~~must allow the parties a reasonable time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors.” While courts exercise discretion in overseeing the examination of jurors, courts must permit reasonable time to examine prospective jurors (as provided in the current rules).

III. Noted Typographical or Drafting Irregularities

The FPD and the ACRP noted a small number of typographical or drafting errors in the proposed amendments. These instances are noted here simply to aid the Task Force.

- **The Comment to Rule 6.8(a)** is incorrectly identified as a comment to Rule 6.7(a).
- **Rule 17.2(a)(5)** appears to be missing a word. Suggested change: “in a noncapital case, the defendant’s plea of guilty or no contest will waive the right to appellate court review of the proceedings on a direct appeal; and that the defendant may seek review only by filing a petition for post-conviction relief under Rule 32 and, if it is denied, a petition for review.”
- **Rule 32.4(c)(1)(D)** is missing a period and contains a confusing double negative structure. Suggested changes: “Notice of Status. The

defendant must file a notice in the Supreme Court advising the Court of the status of the proceeding if a petition is not filed: (i) ~~no~~—~~later than~~ within 12 months after counsel is appointed; or (ii) if the defendant is proceeding without counsel, ~~no later than~~ within 12 months after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later. The defendant must file a status report in the Supreme Court every 60 days until a petition is filed.”

- **Rule 32.11(d)** contains an unnecessary word. Suggested change: “In ruling on any request for an extension of ~~a~~-time to file a brief, the court must consider the rights of the defendant and the victim to a prompt and final conclusion of the case.”

Conclusion

The FPD and the ACRP respectfully submit the above suggestions for the Court's and Task Force's consideration.

Respectfully submitted this 14th day of March, 2017

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Certificate of Service

I hereby certify that on March 14, 2017, I electronically filed the foregoing with the Arizona Supreme Court by using the Court Rules Forum website. I certify that Petitioner will be served with a copy of the comment via email to Mark Meltzer, as allowed by Arizona Supreme Court Rule 28(D)(2).

s/ Jennifer Y. Garcia
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