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SUPREME COURT OF ARIZONA

PETITION TO AMEND THE ARIZONA RULES OF CRIMINAL PROCEDURE	)	Supreme Court No. R-17-0002
	)	Supplemental Petition

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court and this Court's Order establishing a modified comment period in this matter, the Task Force on the Arizona Rules of Criminal Procedure ("Task Force") supplements the petition it filed in January 2017. This supplemental petition includes two appendices that are modified versions of the appendices attached to the Task Force's January petition. Supplemental Appendix A contains the amended rules as proposed last January, supplemented by "redlines" showing changes prompted by the first round of comments. Supplemental Appendix B incorporates the explanations set forth in Appendix B of the January petition, and includes "redlines" explaining the Task Force's recent proposed changes.

Part I: Background. The Court's Order opening R-17-0002 for comment allowed two comment periods. The first comment period concluded on March 14, 2017.

The Task Force broadly circulated the petition after it was filed in January:

- It provided the rule petition to more than twenty major stakeholders, including the State Bar, the Arizona Attorney General, county and local prosecuting agencies and public defenders, presiding judges, appellate judges and staff attorneys, and local, county, and appellate clerks.
- The Chair made presentations during the first comment period to two standing committees of the Arizona Judicial Council: the Committee on Superior Court and the Commission on Victims in the Court. After those presentations, each committee filed a brief supporting comment on the Rules Forum.
- On January 23, 2017, the State Bar issued a press release that publicized and provided a link to the rule petition. A week later, the State Bar's widely circulated e-Legal newsletter encouraged its members to submit comments on the petition, and provided a link to the press release.

To date there have been about two thousand "views" of the petition on the Rules Forum. Eleven formal comments were posted on the Forum, and several more comments were submitted informally. Sources of the comments included prosecutors, defense counsel, court clerks at the trial and appellate levels, a victims' organization, and a bail bondsmen's association. These comments raised concerns and made suggestions, both small and large, on about two dozen rules. Each of the four Task Force workgroups met at least once after the comment period closed on March 14 to discuss comments concerning its assigned rules and to make recommendations to the Task Force. The Task Force then met twice to consider the workgroup recommendations, and to approve changes to the January version of the proposed amended rules.

This supplemental petition will briefly review each rule that was the subject of a comment. It will emphasize comments that propose revisions the Task Force declined to adopt, because Supplemental Appendix B provides a comprehensive explanation of suggested revisions that the Task Force actually adopted.

Part II: Arizona Voice for Crime Victims Comment. Before discussing any of the other comments, the Task Force considered a comment from the Arizona Voice for Crime Victims ("AVCV"). The AVCV's comment, which included a 54-page appendix of proposed rule changes, implicated rules assigned to all four workgroups and raised a general philosophical principle: should the

rules concerning victims be centrally located in Rule 39, as they are now? Or should victim provisions be interspersed throughout the rules, as the AVCV proposed?

The Task Force invited counsel for the AVCV to present the organization's views at its April meetings. AVCV's counsel explained that judges routinely consult specific rules to determine defendants' rights, and judges similarly should be able to review individual rules to determine a victim's respective rights. She noted that judges occasionally overlook a victim's right during the course of a proceeding. Accordingly, the AVCV proposes to specify a victim's right in the rule concerning that proceeding, which it believes will enhance judges' recognition of the victim's right.

Some Task Force members believed the AVCV proposal, which would include the abrogation of Rule 39, should be done by a separate rule petition rather than as part of this restyling project. Other members asked counsel for additional information regarding specific victims' rights that judges may overlook. AVCV's counsel agreed to provide this information during the second comment period, and the Task Force will further consider the issue after the comment period closes. For the time being, the Task Force has declined to adopt the majority of the AVCV's recommendations about adding victims' rights to individual rules because those

rights are already set out in Rule 39 and duplicating them in other rules would be redundant.

Part III: Individual Rules. Following is a brief review of individual rules on which the Task Force received comments.

Rule 1 ("Scope, Purpose and Construction, Computation of Time, Definitions, Size of Paper, and Other General Provisions"):

(a) The Task Force agreed with the AVCV's suggested change to proposed amended Rule 1.2 and added to this rule on "purpose and construction" these underlined words: "Courts, ~~and~~ parties, and crime victims should construe these rules… [etc.]" The Task Force believed this was a correct statement of a general principle, and that the change was appropriate.

(b) The Task Force also relocated the definition of "victim," which is a word used in a variety of rules, from Rule 39 to the "definitions" provided in proposed amended Rule 1.4.

(c) To avoid misunderstanding about whether additional time is added to the response time after electronic service of an appellate filing, the Task Force modified proposed amended Rule 1.3(a)(5) to add the words, "except as provided in Rule 31.3(d)."

(d) The Task Force revised proposed amended Rule 1.6(b)(1)(J) regarding forms to allow deviations from prescribed formatting requirements for

"court-generated forms and forms generated by a court-authorized electronic filing system," in addition to the court's printed forms.

(e) The Task Force declined to adopt the Arizona Association of Superior Court Clerks' suggestion to modify proposed amended Rule 1.6(b) to require a two-inch margin at the top of the first page of filings. In the Task Force's view, the requirement appears unnecessary and might create word-processing problems for practitioners.

(f) The Task Force acknowledged the Association's concern about filing with the judge under proposed amended Rule 1.7(a). But in the Task Force's view, the proposed amended rule is not likely to be abused because a judge is not required to permit filing in this manner.

(g) In recognition that victims, who are not parties, might be document filers, the Task Force rephrased portions of proposed amended Rule 1.6 in the passive voice so the rule is not directed solely to "parties."

Rule 2 ("Commencement of Criminal Proceedings"): In proposed amended Rule 2.3(c), the Task Force corrected an erroneous cross-reference to a Supreme Court rule.

Rule 4 ("Initial Appearance and Arraignment"): Attorney Treasure VanDreumel proposed requiring defense counsel to be present at the initial appearance. The Task Force decided against recommending this change because it

would be a major substantive change to the rules and have substantial financial implications, placing it outside the scope of this rules restyling project.

Rule 6 ("Attorneys, Appointment of Counsel, Investigators, and Experts"):

(a) In a December 2016 order adopting recommendations of the Fair Justice for All Task Force (Rule Petition Number R-16-0041), the Supreme Court adopted an amendment requiring counsel to be appointed in a misdemeanor case for the limited purpose of representing a defendant at or following an initial appearance regarding release conditions. New conforming language was incorporated in proposed amended Rule 6.1(b)(1)(B), with a modification suggested in a comment from the Administrative Director of the Administrative Office of the Courts. The modification prevents the amendment from being misinterpreted as saying that a defendant must be represented by appointed counsel at the initial appearance.

(b) At the suggestion of the Federal Public Defender ("FPD"), the Task Force made a small clarification in proposed amended Rule 6.1(e) to provide that if a defendant withdraws a waiver of the right to counsel, the later appointment of counsel does not "*alone* establish a basis for repeating any proceeding previously held or waived." (The addition is in italics.)

(c) The Phoenix City Prosecutor asked the Task Force to clarify whether proposed amended Rule 6.7(a) provides the defendant a right to ask for a mitigation specialist in a non-capital case, as its text suggests. This rule originated in current Rule 15.9; however, Rule 15.9 allows the court to appoint a mitigation specialist only in a capital case. The Task Force revised the rule when it was relocated to Rule 6.7(a) because it believed that appointment of a mitigation specialist could be appropriate in a non-capital case if the case was sufficiently complex to warrant the appointment. However, the Task Force inadvertently expanded the rule to allow the appointment of a mitigation specialist in any case. To conform to its intended revision, the Task Force amended the proposed rule by inserting the qualifier, "in a felony matter." It bears emphasizing the proposed amended rule leaves it to the discretion of the trial court whether to appoint one.

(d) Supreme Court Staff Attorney Donna Hallam proposed changes to the qualification requirements of Rule 6.8 to assure that the proposed rule is consistent with the existing one. The Task Force agreed with her proposals and modified the rule accordingly, as explained in supplemental Appendix B.

(e) In proposed amended Rule 6.8(e)(4), the Task Force altered the current rule by adding the words, "and the associating attorney is appointed by the court for this purpose," which would have the effect of requiring a court to appoint a specific attorney to serve as the associating attorney. Ms. Hallam questioned

whether a specific appointment is necessary, and suggested deleting the phrase. The Task Force has decided to keep the provision because it believes that court appointment of a specific associated attorney will help assure counsel's accountability. In Task Force's view, a generic appointment of an associated attorney (e.g., "someone in the public defender's office") is insufficient.

(f) At the FPD's suggestion, the Task Force modified the comment to proposed amended Rule 6.8(a) by adding a reference to the "2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases."

Rule 7 ("Release"):

(a) The Task Force made extensive revisions to proposed amended Rule 7, most of which were necessary to conform the rule to changes adopted by the Court's Order in rule petition number R-16-0041. Supplemental Appendix B includes detailed explanations of the Task Force's revisions.

(b) Although the Task Force adopted some suggestions made by the Arizona Bail Bondsmen Association ("ABBA") concerning proposed amended Rule 7, as explained in Supplemental Appendix B, it declined others, including the following:

(1) To strike the phrase "or to comply with the conditions of release" in proposed amended Rule 7.1. In its December 2016 amendments to Rule

7.1, the Supreme Court used the phrase "failure to comply with the conditions of the bond." In light of this recent amendment, the Task Force incorporated the Supreme Court's language into the proposed rule and rejected ABBA's proposal.

(2) In the definition of "security" in proposed amended Rule 7.1, to limit property to "real property." In the Task Force's view, the court should have discretion to decide what type of security is acceptable.

(3) In Rule 7.2(c)(1)(A)(ii), permitting a defendant to be released pending sentencing only if the surety agrees (as well as the State and the defendant.) In the Task Force's view, the surety should not be involved in the court's release decision.

(4) Two proposals concerning Rule 7.6 – one which would require bond exoneration if the defendant is in custody in another jurisdiction, the other which would require exoneration if the defendant was returned to court within 180 days after a failure to appear. In the Task Force's view, these changes are substantive and would be more appropriately adopted by legislative action rather than by rule.

(c) The Task Force also declined to include certain AVCV suggestions concerning Rule 7, including:

(1) In proposed amended Rule 7.2, to add a reference to "the victim," because the rule already refers to "any other person in the community," which would include the victim;

(2) In proposed amended Rule 7.3, to make "no contact" with the victim a "mandatory" condition" of release except in certain limited conditions, because the recent Supreme Court Order regarding Rule Petition R-16-0041 specifies that whether to impose a "no-contact" condition is discretionary with the court;

(3) In proposed amended Rule 7.4, to add that the victim has a right to be heard on release conditions, because that right is already contained in Rule 39 (and is referenced in proposed amended Rule 7.4(b)(2));

(4) In proposed amended Rule 7.6, a change that would allow the victim to be heard on a bond forfeiture, because bond forfeitures are civil in nature and therefore do not fall with a victim's broadly defined right to attend all criminal proceedings.

(d) The Task Force, in response to a comment from the Arizona Attorney General, substantially revised a provision in proposed amended Rule 7.2 regarding release after conviction in the superior court, as explained in Supplemental Appendix B.

(e) The Task Force added a provision in proposed amended Rule 7.6(c) that would allow the bond depositor upon exoneration of the bond to authorize the application of funds to the defendant's financial obligations.

Rule 8 ("Speedy Trial"):

(a) The AVCV proposed a revision to proposed amended Rule 8.1(e) that would provide victims a right to be heard on a suspension of Rule 8's time limitations. The Task Force thought that this proposal had merit, but should be stated in Rule 39. Accordingly, the Task Force modified proposed amended Rule 39(b)(7) to provide that a victim has the right to be heard on a proposed "suspension of Rule 8 or a continuance of the trial date."

(b) The Task Force did not adopt the AVCV's suggestions to add references to "victims" in proposed amended Rules 8.1, 8.2, and 8.4. In the Task Force's opinion, these references are either unnecessary because the rights the changes are intended to confer are already in Rule 39, or they involve substantive changes beyond what Rule 39 already provides.

(c) AVCV proposed conditioning a trial continuance under proposed amended Rule 8.5 on a showing that the continuance would not be "a denial of the victim's right to a speedy trial." In the Task Force's opinion, the change is unnecessary because the proposed amended rule already includes a

provision that "the court must consider the rights of the defendant and any victim to a speedy disposition of the case."

Rule 9 ("Presence of the Defendant, Witnesses, and Spectators"):

(a) Rule 9.1 provides that a defendant's "voluntary absence waives the right to be present at any proceeding." The current rule says that a court may infer that the absence is voluntary if, among other things, "the defendant had *personal* notice" of the date and time of proceeding. The Task Force's initial proposal, accompanying its January 2017 petition, proposed to take out the word "personal" because it did not appear to add anything to the rule's substance. The FPD's comment urged the Task Force to reinsert the word because its absence "will create confusion in cases where the defendant's counsel received notice, but the defendant did not."

The Task Force had its doubts about this argument, as it is unlikely that a court would want to proceed in such circumstances. But, to respond to the concern, it has inserted the word "actual" before "notice." In the Task Force's view, "actual" is more accurate in conveying the intent than "personal"—if the defendant *actually* knows the date and time of a proceeding, it should not matter whether the court told the defendant of the proceeding's date and time *in person*.

(b) Proposed amended Rule 9.3(b) provides (like current Rule 9.3(b)) that "[a]ll proceedings must be open to the public, including news media

representatives, unless the court finds, on motion or on its own, that an open proceeding presents a clear and present danger to the defendant's right to a fair trial by an impartial jury." The AVCV proposed adding an additional clause at the end: "or to the victim's rights to be treated with fairness, respect, and dignity and to be free from intimidation, harassment, and abuse."

The Task Force decided against adopting this change because it would be a major substantive change to the rule. Applying the current rule already requires a court to balance a defendant's constitutional right to a fair trial against the constitutional guarantees of public access to court proceedings. It is not obvious, as the AVCV's proposal seems to suggest, that a victim's rights to a closed proceeding are equivalent to those of a defendant, or that the U.S. or Arizona constitutions would permit a court to close a court proceeding to protect the victim against "harassment" or to afford the victim "respect and dignity."

Rule 10 ("Change of Judge or Place of Trial"): The Task Force declined to add references to the "victim" in this rule, as proposed by the AVCV. It also declined to adopt what the Task Force considered a substantive change to the rule proposed by attorney Treasure VanDreumel that would engraft a due process right to a change of judge. The Task Force learned that the Phoenix Municipal Court has a longstanding local rule that extends the time for filing a notice of change of judge as a matter of right. The local rule accommodates the practicalities of when

defense counsel are appointed. The Task Force accordingly added to proposed Rule 10.2(c)(1) the words "or extended by local rule."

Rule 11 ("Incompetence and Mental Examinations"):

(a) Currently, Rule 11.3(c) provides that a court must appoint an expert from "its approved list." The Task Force deleted the reference to an "approved list" in proposed amended Rule 11.3(a)(2) because some counties do not use an "approved list" and because deleting the requirement would give a court greater flexibility in dealing with unusual competence situations (neurological, dementia, etc.). The Arizona Prosecuting Attorneys Advisory Council ("APAAC") urged the Task Force to reinsert the requirement. The Task Force decided against doing so because, as revised, there is nothing in the proposed amended rule that would preclude a county from having an "approved list," and it was not clear why every county must have one.

(b) The Task Force made two small changes to Rule 11.4 suggested by the comment of the Maricopa County Attorney's Office: (1) the Task Force slightly changed proposed amended Rule 11.4(a) to clarify that it applies only to reports of experts appointed under Rule 11.3; and (2) the Task Force modified proposed amended Rule 11.4(b) to clarify that it refers to reports of a mental health expert other than those covered under (a).

(c) A defense attorney submitted an informal comment regarding Rule 11.5(b)(3) and the options available to a judge when a defendant is incompetent and non-restorable. The previously proposed language suggested that the judge could select no more than one option. The Task Force modified this provision to allow the selection of more than one option. The Task Force further noted that *State v Hegyi (Rasmussen)*, which is now pending before the Arizona Supreme Court, could require further changes to Rules 11.4 and 11.8.

Rule 12 ("The Grand Jury"):

(a) Proposed amended Rule 12.7(b) provides that the record of a grand jury vote "may be made available only to the court, the State, and the defendant." The FPD proposed replacing the word "may" with "must" to avoid "confusion." The Task Force decided against adopting this change because it would inadvertently create a rule at odds with the rule's intent. The rule is intended to restrict distribution to *only* the court, the State, and the parties. But if the FPD proposal were adopted, the court reporter would be required to make the record available to the court, State, and defendant, but the rule would be silent as to whether the court reporter has the discretion to make the record available to others.

(b) Proposed amended Rule 12.7(c), which governs the filing and distribution of grand jury transcripts, provides that the transcripts "may be made available only to the court, the State, and the defendant." As it did with proposed

amended Rule 12.7(b), the FPD advocated replacing "may" with "must." The Task Force decide against making this change because it, like the FPD's other suggestion, again has an unintended consequence contrary to the rule's intent. The court reporter would be required to the make the transcripts available to the court, State, and defendant, but the rule would be silent as to whether the court reporter has the discretion to make the transcripts available to others.

Rule 13 ("Indictment and Information"):

(a) In response to one of the FPD's comment, the Task Force replaced the word "may" with "must" in the rule's second sentence so that the proposed amended rule provides that "a court must dismiss the information" if the State fails to file a timely information and the defendant moves for dismissal.

(b) Also in response to one of the FPD's comments, the Task Force also changed "may" to "must" in proposed amended Rule 13.4(a), so the proposed amended rule provides that "a court must order a severance of counts, defendants, or both" if the conditions set forth in the rule apply. The Task Force also reorganized the sentence structure of Rule 13.4(a) for greater clarity.

Rule 15 ("Disclosure"):

(a) Proposed amended Rule 15.1(b)(2) (like the current rule) requires the disclosure of "any statement of the defendant and any co-defendant." A comment from the Maricopa County Attorney's Office suggested that "any" was

too broad and could be burdensome. The Task Force discussed adding qualifiers to the provision, such as "relevant" or "connected to the case," or requiring disclosure if the prosecutor "knows" about the statement. In the end, it concluded that the language of this rule, which mirrors the current rule, is not being abused, that attorneys and judges would continue to apply it in a practical manner, and that no change was necessary.

(b) In response to various comments, the Task Force modified Rule 15.1(b)(4)(C), and the companion provisions under proposed amended Rule 15.2(c)(2)(C) and (h)(1)(A)(iii), to provide that if a testifying expert has not prepared a written report, the disclosing party must not only disclose the general subject matter on which the expert will testify but also must disclose the expert's anticipated opinions. The Task Force also modified proposed amended Rules 15.1(b)(4) and 15.2(c)(2)(A) to require the disclosing party to disclose not only the expert's name and address, but also the expert's "qualifications."

(c) Currently, Rule 15.1(f)(2) requires a prosecutor to disclose material and information in the possession and control of "[a]ny law enforcement agency" that "has participated in the investigation and of the case and that is under the prosecutor's direction and control." In its petition last January, the Task Force proposed modifying the provision to include only "state, county, or municipal law enforcement agenc[ies]," which would exclude federal law enforcement agencies.

With that qualification, it also eliminated the requirement that the agency be "under the prosecutor's direction and control." APAAC's comment criticized the change for being too broad, while the FPD's comment criticized it for being too narrow. The Task Force discussed alternatives, and the resulting consensus was to revert to the current rule's language.

(d) In proposed amended Rule 15.2(a)(1)(H), which governs "inspections of the defendant's body," the Task Force changed the word "may" to "must," i.e., the inspection "must not include a psychiatric or psychological examination."

(e) In proposed amended Rule 15.3(a), in response to a comment from the AVCV, the Task Force replaced the phrase "those excluded by Rule 39(b)" with "victim."

(f) Proposed amended Rule 15.4(a)(2) includes a definition of "writing." In response to one comment, the Task Force slightly modified the definition to clarify that a "writing" must be "recorded."

Rule 16 ("Pretrial Motions and Hearings"):

(a) In response to comment from the FPD, the Task Force modified proposed amended Rule 16.2(c)(4) to add the phrase "including the fact that such testimony occurred" into the rule so that it provides that "the defendant's testimony at the hearing, including the fact that such testimony occurred, will not be

disclosed to the jury . . . ." This provision is in current Rule 16.2(a)(4), and was inadvertently omitted when the rule was restyled.

(b) The Task Force decided against including the various references to "victims" and victim's right proposed by the AVCV because they appeared redundant to provisions already in Rule 39.

Rule 17 ("Pleas of Guilty and No Contest"):

(a) The Task Force proposes adopting a new Rule 17.7 governing procedures for submitting a case to a court on a stipulated record. Currently, the title to Rule 17.2 refers to the "[d]uty of court to advise of defendant's rights and consequences . . . of submitting on the record," but the Task Force did not include that last phrase in its title to proposed amended Rule 17.2.

The Office of the Attorney General has submitted a comment expressing concern that this deletion in the title of Rule 17.2 is a substantive change in the rule, effectively eliminating the option of submitting a case on the record. That was not the Task Force's intent, as cases are frequently submitted on the record when a defendant or the State wishes to take an immediate appeal after losing a suppression motion or some other critical pretrial motion. The problem is that while the title of current Rule 17.2 refers to submitting a case on the record, the rule itself does not discuss the procedure for doing so and instead focuses only on the required disclosures for a guilty or no contest plea.

To resolve the issue, Task Force proposes adopting a new Rule 17.7 that sets forth appropriate disclosures, along with a required finding that a defendant's agreement to submit a case on the record was made voluntarily and intelligently. The rule draws largely on the requirements set forth by the Supreme Court in *State v. Avila*, 127 Ariz. 21, 24, 617 P.2d 1137, 1140 (1980). Rule 17's title also was slightly modified to refer to submissions on a stipulated record.

(b) Rule 17.4 deals with the subject of plea negotiations, and proposed amended subpart (g) provides that a defendant who withdraws a plea after a presentence report may exercise a change of judge right as a matter of right under Rule 10.2 but only "if the defendant has not previously exercised that right." The FPD's comment argued that this is a substantive change because the current rule supposedly gives a defendant the right to notice the judge even if the defendant has previously exercised that right. It urged the Task Force to replace the quoted clause with "but no additional disqualification of the judge under this rule is permitted," which is similar to text in the current rule.

The FPD comment, however, proceeds from a faulty premise about the existing law. Arizona appellate courts have interpreted the language of the current rule to mean exactly what is in the proposed amended rule, i.e., a defendant may notice a judge under Rule 17.4(g) *only* "if the defendant has not previously exercised that right." *See Hill v. Hall ex rel. Yuma Cnty.*, 194 Ariz. 255, 258 ¶ 10,

980 P.2d 967, 970 (App. 1999) (a defendant who has exercised his right to a change of judge under Rule 10.2 is not entitled to an automatic change of judge under Rule 17.4(g) because a defendant may exercise "only one peremptory challenge of a judge by way of either Rule 10.2 or Rule 17.4(g)"). Consequently, the Task Force decided against adopting the FPD's proposed language.

To avoid confusion, however, the Task Force made a small modification to the rule's title to say "Change of Judge" rather than "Automatic Change of Judge." Because a defendant may not have a right to notice a judge if such a right was previously exercised, it may be misleading to suggest that the right to notice the judge is "automatic."

(c) Rule 17.1(f)(1) deals generally with the authority of a limited jurisdiction court to accept a plea telephonically. Proposed amended Rule 17.1 (f)(1)(C) provides that before accepting a plea, a court "must hold a telephone hearing with the parties" and then make certain findings and disclosures. The AVCV proposed adding the phrase "and the victim, if any," after the word "parties." The Task Force decided a preferable approach would be an amendment to Rule 39(a). The Task Force accomplished this by expanding the definition of a "criminal proceeding" to any matter that the court holds "telephonically or in person."

Rule 18 ("Trial by Jury; Waiver; Selection and Preparation of Jurors"): In response to a comment from the FPD, the Task Force modified proposed amended Rule 18.5 to provide that a court "must"—and not just "may"—allow the parties to conduct voir dire. The change is consistent with existing case law. *See State v. Anderson*, 197 Ariz. 314, 320-21, 4 P.3d 369, 375-76 (2000) ("Under existing Arizona law, the judge lacks discretion to deny defense counsel's request [to conduct voir dire] under Rule 18.5.").

Rule 19 ("Trial"):

(a) After the submission of the initial petition, the Task Force discovered that its comment to proposed amended Rule 19.3 was inadvertently omitted. It has now been added: "Former Arizona Rule of Criminal Procedure 19.3, which set forth the rules of evidence applicable in criminal proceedings, has been abrogated as unnecessary in light of the adoption of the Arizona Rules of Evidence, including Arizona Rules of Evidence 801(d)(1)(A) and 804(b)(1)."

(b) Ms. Van Dreumel's comment proposed adding to Rule 19: (1) a bifurcated process for *Enmund/Tison* findings in a felony murder case; and (2) a process for a judicial determination of intellectual disability. The Task Force concluded that these proposed changes are substantive and they would be more appropriately raised by separate rule petitions. Ms. VanDreumel also proposed a change allowing the court to dismiss aggravating factors, but Task Force believes

this procedure is already encompassed within the Task Force's draft of proposed amended Rule 20.

Rule 21 ("Jury Instructions and Verdict Forms"): The FPD objected to the inclusion of the last sentence of draft Rule 21.3(b), which says, "If a party does not make a proper objection, appellate review is limited to a review for fundamental error only." The FPD stated that standards of appellate review are not specified in other rules, and Rule 21.3(b) should not be an exception. However, members noted that the FPD did not suggest that the last sentence of Rule 21.3(b) was an incorrect statement. Moreover, current Rule 21.3(c) is incorrect and requires corrected language; and deleting this last sentence might imply (especially to self-represented litigants) that there are no negative consequences for a failure to object. After discussion, the Task Force modified the last sentence of Rule 21.3(b) as follows: "If a party does not make a proper objection, appellate review may be ~~is~~ limited ~~to a review for fundamental error only~~."

The FPD also objected to language in draft Rule 21.4(a) that requires the court to submit verdict forms for lesser included offenses "on request by any party and if supported by the evidence." The FPD contended that courts have this duty even in the absence of a party's request, and it suggested deleting the words "on request by any party." Some Task Force members supported the FPD's recommendation. Others expressed that judges should not submit lesser included

verdict forms to the jury over the defendant's objection, and that appellate courts support trial judges who are "loathe" to submit lesser included forms. The Task Force deferred this issue until the second comment period.

Rule 26 ("Judgment, Presentence Report, Presentencing Hearing, Sentence"):

(a) Currently, Rule 26.6(a) provides that "[t]he court shall permit the prosecutor and defense counsel . . . to inspect all presentence, diagnostic and mental health reports." In its proposed amended rule, the Task Force added the phrase "concerning the defendant" to preclude a co-defendant from having an automatic right to reports concerning other defendants. The FPD comment urged the Task Force to eliminate the limitation. After discussion, the Task Force has decided to retain the proposed limitation.

(b) The Task Force decided against including the various references to "victims" and victim's right proposed by the AVCV because they appeared redundant to provisions already in Rule 39.

Rule 27 ("Probation and Probation Revocation"):

(a) The AVCV proposed a change to proposed amended Rule 27.1 that would require the court not only to impose conditions that promote the probationer's rehabilitation, but that also "protect the victim." Some Task Force members believed this would be a substantive change; others argued that the

protection of the victim is subsumed under the broader topic of rehabilitation. Yet other members noted that even though Rule 39 does not include this requirement, and although the change might be substantive, it raises a consideration that is not always intuitive for judges but should nevertheless be a component of the probationer's terms. Some also argued that "protect the victim" should be included in Rule 27 because a victim might not always be present at sentencing, or if present, might not always speak up. In the end, the Task Force adopted the provision on a split vote, with about two-thirds of the members favoring the provision and about one-third opposed to it.

(b) In response to the comment submitted by the FPD, the Task Force proposes modifying the second sentence of proposed amended Rule 27.4 to provide that a motion to terminate probation may be made not only by the probation officer and the court, but also by the probationer. In response to a comment from the AVCV, it also proposes modifying that sentence to provide that the court may take action only after giving the victim and the State the opportunity to be heard.

(c) In response to a comment, the Task Force considered modifying Rule 27.7(c) to reinstate a cross-reference to Rule 7.2, the general rule on release. (This reference to Rule 7.2 is currently in Rule 27.7.) The problem is that Rule 7.2 does not provide any procedures for the conditions of release following an arrest on a

probation violation, which is the general subject of Rule 27.7(c). The Task Force concluded that developing such procedures would entail a substantive change to the rule, and that merely cross-referencing Rule 7.2 would not serve any purpose. Consequently, the Task Force decided against reinstating the cross-reference to Rule 7.2 in Rule 27.7(c).

Rule 31 ("Appeals"):

(a) The Court of Appeals' clerk for Division One made two suggestions.

(1) The clerk suggested modifying proposed amended Rule 31.8(d)(1) to require a court reporter to transmit completed transcripts to the superior court as well as to the appellate court. The Task Force was initially unsure whether the superior courts in all counties have sufficient storage capacity to handle the receipt of additional transcripts. However, further inquiry revealed that the appellate court is currently, and automatically, sending reporters' transcripts to the superior court. Accordingly, it amended Rule 31.8(d)(1) to add "trial" courts to the title and "trial court clerks" to the body of this provision, which would require the authorized transcriber to send transcripts to both trial and appellate courts. The Chair invites the Arizona Association of Superior Court Clerks ("Clerks Association") to comment on this proposed change during the second comment period.

(2) The clerk also requested an alteration of the deadline for filing an amicus brief under Rule 31.15(c). The proposed amended rule says that it must be filed no later than 21 days after the deadline for filing the final reply brief; the clerk proposes having deadline no later than 21 days after the response is due. The clerk observed that amicus briefs are rarely filed, yet this time frame results in additional delay in processing every criminal case. However, the Task Force recommends retaining its original proposal, first, because reply briefs are common in Division Two, and also, because amicus briefs are typically filed only in cases in which a reply brief is filed.

(b) The Arizona Association of Superior Court Clerks had logistical concerns with a requirement in proposed amended Rule 31.9(c) that the superior court clerk make the record on appeal "available electronically to all parties" Because the clerks in some counties do not have the technological wherewithal to transmit the record to the parties electronically, the Task Force agreed with its concerns and proposes deleting from this phrase the word "electronically."

(c) The Supreme Court clerk noted that proposed amended Rule 31.10, which governs a brief's contents, omits a provision currently in Rule 31.13(e) that authorizes the court to sanction parties for noncompliance with the rule. The Task Force agreed that this omission was inadvertent and added an

identical provision as a new Rule 31.10(k): "**Non-Compliance.** The appellate court may strike a brief or other filing that does not substantially conform to the requirements of these rules."

(d) Supreme Court Staff Attorney Hallam noted that Rule 31.23(a), which concerns the issuance of an execution warrant, inappropriately refers to a defendant who has not filed a petition for review "with the Court of Appeals." Because a capital defendant would not file a petition for review in the Court of Appeals, the Task Force deleted that phrase. (The FPD made a similar comment.)

(e) Also in response to a comment from Ms. Hallam, the Task Force replaced the archaic reference to the "superintendent of the state prison" in proposed amended Rule 31.23(d) with a reference to the "director of the Arizona Department of Corrections."

(f) The Task Force decided against adopting the following suggestions:

(1) One comment opposed proposed amended Rule 31.3(d), which says (like the current rule) that a party does not get five additional days to respond to a brief or other appellate document that is served electronically. The comment complained that briefs that are filed electronically are not always served electronically, which warrants keeping the five-day mailing rule. The comment, however, misapprehends the rule. The five-day mailing rule does not apply *only* if

the appellate document is *served* electronically. In the scenario the comment described, the recipient would still get the five-day added response time because the document, although *filed* electronically, was not *served* electronically.

(2) The Attorney General's comment supported the inclusion of opening statements and arguments in the record on appeal under proposed Rule 31.8. This comment required no action.

(3) A comment from Attorney Nicole Farnum (and a separate comment from Treasure Van Dreumel) concerned Rule 31.8 and would require the court to provide parties with paper transcripts on request. The Task Force believes this was adequately addressed by Rule 31.8(d)(3).

Rule 32 ("Post-Conviction Relief"):

(a) The FPD's comment noted that in a capital case, the Arizona Supreme Court clerk rather than the defendant files a notice of PCR. The Task Force agreed and added "or the Supreme Court" to proposed amended Rule 32.4(a)(4)(A).

(b) The FPD also commented on the appointment of counsel provision in non-capital cases, Rule 32.4(b)(2). The Task Force discussed whether the right arises "after the timely filing of a notice of defendant's first Rule 32 proceeding or in any of-right proceeding," which was the text in the original Appendix A; or whether it arises "after the filing of a notice of a defendant's timely or first Rule 32

proceeding." The Task Force decided to use the FPD's proposed text, which conforms to the current rule.

(c) The Task Force decided against adopting the FPD's proposal to increase the page limits in Rule 32.5(b) to 100 pages for opening and response briefs, which would more than double the number of pages now allowed. It concluded that this would be a substantive change.

(d) Currently, Rule 32.5 provides that if a petitioner files a non-complying petition, it must be returned to the defendant with an order specifying how the petition fails to comply with the rules. The current rule then goes on to say that the defendant has 30 days "after defendant's *receipt* of the non-conforming petition" to file a petition that complies with the rules. (Emphasis added.) Because there is no way for the court to know when the defendant receives the non-conforming petition, proposed amended Rule 32.5(e) measures the time for compliance from the date the order is "*entered*," i.e., filed. The FPD comment opposed this change because it shortens the compliance time conferred by the current rule. To mitigate that consequence, the Task Force proposes increasing the time for compliance from 30 days to 40 days.

(e) In response to a comment, the Task Force modified Rule 32.9(c)(3) to provide that if a motion for an extension of time is filed, the court must decide the motion "promptly."

(f) The Task Force considered the Attorney General's proposed revision regarding Rule 32.9(c)(5)(A). The proposed rule says that "[t]he petition or cross-petition must not incorporate any document by reference, except the appendix." The Attorney General would delete "except the appendix," but the Task Force declined to make this change.

(g) Rule 32.4(e)(5) provides that preparation of transcripts for an indigent defendant is a county expense. APAAC requested that this provision clarify when this cost is the expense of a municipality. The Task Force declined to make this substantive change because current Rule 32.4(d) also provides that the transcripts must be provided at county expense.

Rule 39 ("Victims' Rights"): The Task Force adopted several changes to Rule 39 as noted elsewhere in this supplemental petition and in Supplemental Appendix B. However, the Task Force declined APAAC's suggestion to add back to this rule the victim's right to be notified "of any escape of the defendant." The Task Force previously deleted the provision because responsibility for this notification requirement rests with law enforcement, not prosecutors or courts.

Although not in response to a comment, the Task Force added a new amended Rule 39(d)(4) as a result of recent legislation, (Laws 2017, Chapter 36, HB 2241). This new rule requires parties to endorse the victim's counsel on

pleadings, and for the court to include victim's counsel during bench and in-chambers conferences that involve the victim's constitutional rights.

Part IX: Conclusion. The Task Force appreciates the numerous stakeholder comments. Even if a comment was not adopted, it was discussed and thoughtfully considered. These comments as a whole improved the Task Force work product.

The Task Force notes this Court's Order reopens rule petition number R-17-0002 for a second round of comments, which concludes on May 31, 2017. The Task Force will file its reply by the July 7, 2017 deadline.

RESPECTFULLY SUBMITTED this 25th day of April, 2017

By /s/ Judge Joseph Welty
Hon. Joseph Welty, Chair