Hon. Joseph Welty, Chair
Task Force on Rule 32, Ariz. R. Crim. P., Petitioner
1501 W. Washington St.
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE 32; TO ADOPT A NEW RULE 33; TO AMEND VARIOUS RULE 41 FORMS AND TO ADOPT NEW FORMS; TO RENUMBER RULE 33, ARIZONA RULES OF CRIMINAL PROCEDURE; AND TO ADOPT A CONFORMING CHANGE TO RULE 17.1(e), ARIZONA RULES OF CRIMINAL PROCEDURE	) Supreme Court No. R-19-____)) With a Request for a Modified) Comment Period

Petitioner is the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure, which is submitting this petition through its undersigned chair. Petitioner requests this Court to amend Rule 32 and to adopt a new Rule 33, as shown in Appendices 2 and 3. Because new Rule 33 would displace current Rule 33 ("criminal contempt"), Petitioner requests the renumbering of current Rule 33 as Rule 35, which is presently "reserved." Petitioner also requests a conforming change to Rule 17.1(e).

The Court's adoption of the proposed rules would necessitate amendments to existing forms and the adoption of new forms. The new and amended forms will be based on substantive changes to Rules 32 and 33. Petitioner proposes a modified comment period that would allow Petitioner to file an amended petition after an initial comment period, and to concurrently file proposed forms that reflect Petitioner's substantive rule changes following the round of initial comments.

Because of the extent of the proposed revisions to Rule 32, Petitioner does not believe a version showing deletions and additions to the current rule would be useful. However, Petitioner is submitting an appendix (Appendix 4) that details and analyzes the proposed changes to Rule 32, and how the provisions of proposed Rule 33 differ from, or are like, the corresponding provisions of Rule 32.

1. Background. A previous Supreme Court Task Force, the Task Force on the Arizona Rules of Criminal Procedure, undertook a global restyling of the criminal rules, including Rule 32. (See Rule Petition No. R-17-0002.) The previous Task Force recognized the need for substantive revisions to Rule 32, but because its primary objective was restyling, it refrained from making significant substantive changes to Rule 32. Instead, the Criminal Rules Task Force recommended that the Court establish another committee for that purpose.

On January 24, 2018, the Court entered Administrative Order No. 2018-07, which established the Task Force on Rule 32 of the Arizona Rules of Criminal

Procedure (hereinafter "Task Force"), the present petitioner. The Order directed the Task Force to "identify possible substantive changes that improve upon the objectives of Rule 32 and the post-conviction relief process."

Task Force membership includes judges from the Arizona Court of Appeals in Divisions One and Two; judges of the Superior Court of Arizona in Maricopa, Coconino, Mohave, and Pima Counties; a municipal court judge; an equal number of prosecutors and defense counsel, including representatives of the Office of the Arizona Attorney General and the Federal Public Defender's Office; a victims' rights representative; and a professor from the James E. Rogers College of Law at the University of Arizona. Task Force staff includes the chief staff attorney of Division Two, and a specialist from the Court Services Division of the Administrative Office of the Courts ("AOC").

The Task Force met five times in 2018, usually in full-day sessions and frequently with guests in attendance. The Chair established three workgroups to review assigned issues, and these workgroups collectively had ten meetings. There were also several informal meetings involving one or two judges and staff, or the Chair and staff, which were devoted to revising the Task Force work product and drafting new Rule 33.

At the first Task Force meeting, a member from the Pima County Public Defender's Office and the Division Two chief staff attorney presented memoranda

that identified 18 issues requiring discussion. A list of these items is in Appendix 1. The Task Force subsequent noted other issues. Some issues overlapped. A few issues were resolved relatively easily. Other issues were complex and required extensive legal research and extended conversations. All the issues were ultimately addressed. However, three issues deserve special mention.

2. Proposed Rule 33. The term "of-right" petition first appears in the second paragraph of current Rule 32.1. This term, which is derived from case law, is one that many stakeholders find unclear and confusing. Members considered alternative nomenclature, but they found no better substitute for this term. Although they discussed separating of-right provisions into their own distinct sections of Rule 32, they also realized that this might confound self-represented litigants seeking a clear explanation for the of-right process. Furthermore, the term "of-right" requires users to distinguish pleading defendants from non-pleading defendants, which is another confusing subset of terminology, especially for self-represented defendants.

Ultimately, the Task Force decided to locate within a new Rule 33 all the provisions concerning post-conviction relief for defendants who entered a guilty or no-contest plea, who admitted a probation violation, or who had an automatic probation violation because of a plea to a new offense. This allows "pleading" defendants to have a single, self-contained rule, customized to their procedural circumstances, to guide them through the post-conviction process. This new rule is

more understandable because it no longer includes references to of-right defendants. Defendants availing themselves of Rule 33 will have no need to consult Rule 32 and search for the provisions that apply to their cases. Similarly, Rule 32 is self-contained for defendants who seek post-conviction relief after a trial or a contested probation violation hearing, or who have been sentenced to death. Thus, non-pleading defendants will no longer need to sift through of-right provisions that have no application to their situations, as they must do under current Rule 32.

One drawback of the split Rule 32/Rule 33 solution is that Rule 33 necessarily duplicates many of the provisions in Rule 32, and duplication increases the length of the Criminal Rules. The Task Force considered including in Rules 32 and 33 only the provisions that are not common to both, and then creating a third rule that contained provisions that apply to both non-pleading and pleading defendants. However, that would defeat the advantage of having truly self-contained rules for these distinct categories of defendants. Another drawback of the Rule 32/33 split is that future amendments to one rule might need to be made to the other. In addition, when counsel rely on an appellate opinion interpreting one of these rules, they might need to show that it also applies to a parallel provision in the companion rule that governs their case. Finally, the reorganization and renumbering of rule subparts because of the split might make legal research more challenging. However, the consensus of the Task Force is that for years to come, self-represented litigants,

practitioners, and judges will not only become accustomed to the change, they also will benefit from the clarity and focus of two distinct, self-contained rules.

Proposed Rules 32 and 33 are in Appendices 2 and 3.

3. The matter of preclusion. The Task Force concluded that two additional grounds for relief in Rule 32.1 (and the corresponding grounds in Rule 33) should not be subject to the rule of preclusion. Rule 32.1(b) currently provides as a ground for relief that "the court did not have jurisdiction to render a judgment or to impose a sentence on the defendant." Rule 32.1(c) affords a defendant sentencing relief if "the sentence imposed exceeds the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law." Under current Rule 32.4(a)(2), a defendant may not seek relief under Rule 32.1(b) or (c) in an untimely proceeding. A defendant also is precluded by current Rule 32.2(a)(3) from raising such a claim if the defendant could have, but did not, raise it at trial, on appeal, or in a previous post-conviction proceeding.

The Task Force concluded that the term jurisdiction in current Rule 32.1(b) was most likely intended to refer only to subject matter jurisdiction. The distinction between types of jurisdiction is significant because while personal jurisdiction can be waived, subject matter jurisdiction cannot be waived. Defendants rarely raise true claims of lack of subject matter jurisdiction in post-conviction proceedings, but the Task Force believed as a matter of policy that those claims should not be

precluded, consistent with the principle that subject matter jurisdiction can be raised at any time. See *State v Espinoza*, 229 Ariz. 421 (App. 2012); see also *State v. Maldonado*, 223 Ariz. 309 (2010).

Members also discussed the troubling circumstance of a defendant whose sentence exceeds what the trial court intended to impose, or what was permitted by law; but who did not become aware of the discrepancy in a timely manner, or who had that awareness only after he or she has already concluded a post-conviction proceeding. Although these defendants might file a Rule 32 petition as soon as they become aware of the discrepancy, that is often not until the Department of Corrections provided computations of their sentences pending the approach of their anticipated release dates. The notice or the petition would be subject to summary dismissal on grounds of preclusion or untimeliness, leaving the defendant with no remedy. See, e.g., *State v. Diaz*, 236 Arizona 361 (2014), *State v. Goldin*, 239 Ariz. 12 (App. 2015), and *State v. Gonzales* 216 Ariz. 11 (App. 2007).

Accordingly, the Task Force recommends changes to proposed Rule 32.2(b) ("claims not precluded"), to Rule 32.4(a) (setting time limits for filing the notice), and to the corresponding provisions of proposed Rule 33 (33.2(b) and 33.4(a), so that claims under Rule 32.1(b) or (c), or under Rule 33.1(b) or (c), would not be subject to preclusion based on waiver or untimeliness). The Task Force believes that the number of meritorious claims under these sections is relatively small. And

if a court did not have subject matter jurisdiction, or if a sentence is truly illegal, the interests of victims and the judicial system's interest in the finality of judgments are not furthered by precluding those claims. Proposed Rules 32.2(b) and 33.2(b) would further provide that when a defendant raises a claim that falls under 32.1(b) through (h) or 33.1(b) through (h), he or she

> must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why defendant did not raise the claim in a previous notice or petition, the court may summarily dismiss the notice.

4. Rule 32.1(h). Current Rule 32.1(h) affords relief upon "clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt, or that the death penalty would not have been imposed." In *State v. Miles*, 243 Ariz. 511 (2018), this Court considered the application of Rule 32.1(h) in a death penalty case. Although the majority's disposition of the case did not rest on an interpretation of this provision of the rule, the case presented this issue: "Can newly proffered mitigation ever constitute clear and convincing evidence under Rule 32.1(h) that a sentencer would not have imposed the death penalty?" *Miles*, 243 Ariz. at 513, ¶ 6. Footnote 6 of a concurring opinion acknowledged the Chief Justice had established this Task Force and stated, "Rule 32.1(h) is a prime candidate for the Task Force's consideration." *Id.* ¶ 32 n. 6.

Rule 32.1 has a corollary in A.R.S. § 13-4231, which defines the scope of post-conviction relief. The provision in Rule 32.1(h) is not one of the specified statutory grounds for relief, and the Task Force initially addressed whether this presented a separation-of-powers issue. Members concluded that the adoption of Rule 32.1(h) was within the Court's prerogative and noted that in the two decades since its adoption, the Legislature has not sought to invalidate the rule. Beyond that, members had divergent views on addressing the footnote in *Miles*.

One view: One view proposed a two-pronged revision to section (h). Members with this view believed that the aggravation phase of a capital case relies on objective evidentiary findings, and the first prong would add to section (h) the phrase, "no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752." The second prong would delete the words, "the death penalty would not have been imposed," and this would no longer allow relief under section (h) from a penalty phase verdict. These members believe that the current rule's standard— that the fact-finder would not have imposed the death penalty —is vague and subjective, requiring the PCR judge to get inside the mind of the original jury or judge, a nearly impossible task. Members holding this view believe that if a defendant such as Miles is going to obtain relief based on newly discovered mitigation evidence, it should be on grounds that this is newly discovered evidence under Rule 32.1(e) or that the evidence was

previously unknown because of the ineffective assistance of counsel, a claim that falls under Rule 32.1(a).

Another view: Another view is that the Arizona Supreme Court had three opportunities to consider the appropriateness of the provision at issue: first in the original rule petition, R-97-0006, then in a subsequent rule petition filed by the Arizona Attorney General, R-01-0015, and a third time in *Miles.* On each occasion, the Court either supported the rule or retained its substance.

Members holding this view further noted that Rule 32.1(h) has a high standard that is difficult to meet, and that on only a handful of occasions have capital defendants sought relief under this provision. These members therefore do not anticipate a flood of new petitions seeking relief under that provision because of *Miles.* They also believe that the revisions proposed by members holding the first view do not just clarify the rule, as *Miles* requested, but substantively change the rule, which they believe was unnecessary.

A third view: At the November Task Force meeting, a member introduced another proposed revision to Rule 32.1(h). The intent of this version is only to address the issue presented in *Miles* by clarifying that the standard is an objective one. That proposed revision states as follows:

> **(h)** the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty <u>of the offense</u>

beyond a reasonable doubt, or that no reasonable fact-finder would have imposed the death penalty ~~would not have been imposed~~.

Following further discussion, members voted on whether to include in their final version of Rule 32 the amendments proposed by the first view, or the amendments proposed at the November meeting. Seven members favored the newly proposed November modification, six members favored the revisions proposed by the first view, and one member abstained. Accordingly, the version shown directly above is included in the proposed amendments to Rule 32, as shown in Appendix 2. However, a member holding the first view submitted a position statement that is contained in Appendix 5.

5. Other issues. Although Rule 32 was recently restyled, the Task Force made further changes to grammar and syntax to improve the rule's clarity and increase its readability. In addition to the substantive changes discussed in the previous pages of this petition, the following substantive and stylistic changes are also noteworthy. References below are to the proposed rules. Please note that Appendix 4 contains a more detailed description of the proposed rule revisions.

A. Rules 32.4(b)(3)(A) and 33.2(b)(3)(A): *State v. Whitman*, 234 Ariz. 565 (2014) clarified that the time for filing a notice of appeal runs from the oral pronouncement of sentence, rather than from when the judgment of sentence is filed, and Rule 31.2(a) was amended accordingly. The Task

Force proposes similar amendments to make Rules 32 and 33 consistent with Rule 31 and with *Whitman.*

B. Rule 32.5(b): The proposed amendment would require the appointment of co-counsel to a capital post-conviction proceeding "if the trial court finds that such assistance is reasonably necessary." This amendment codifies current practices in Maricopa County.

C. Rules 32.5(d) and 33.5(c): Proposed amendments to these rules clarify that upon the filing of a notice, the defendant's prior counsel must share files and other communications with PCR counsel, and that this sharing of information does not waive the attorney-client privilege or confidentiality claims.

D. Rules 32.6(b) and 33.6(b): These proposed amendments would essentially codify *Canion v. Cole*, 210 Ariz. 598 (2005), by allowing parties to conduct discovery for good cause after a petition has been filed. The proposed amendments also would supersede *Canion* by allowing discovery after the filing of a notice but before the filing of a petition upon a showing of substantial need. The proposed rules provide different standards for allowing discovery in each of these circumstances.

E. Rules 32.6(c) and 33.6(c): After discussing *State v. Chavez*, 243 Ariz. 313 (App. 2017), members decided to establish a list of rule requirements that

counsel must address when filing a Notice of No Colorable Claims. The lists in Rule 32 and Rule 33 are different because they are tailored to whether the defendant was convicted after a trial or entered a plea.

F. Rules 32.6(f) and 33.6(f): Members added these rule provisions to provide that when a defendant raises a claim of ineffective assistance of counsel in a PCR notice, the defendant "waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim, as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4)."

G. Rules 32.7(c) and 32.9(c): To provide more realistic limits for the length of petitions, responses, and replies in capital cases, these rules increase the limits to 160, 160, and 80 pages, respectively. Also, a provision in current Rule 32.4(c)(1)(D) that requires counsel in a capital PCR to provide status reports to the Supreme Court under specified circumstances has been omitted based on a belief that although these reports might have been of benefit in the past, they now have limited value.

H. Rules 32.10(a) and 33.10(a): These provisions would extend to PCR proceedings the rights to a change of judge provided by Rules 10.1 and 10.2 whenever the PCR proceeding is assigned to a new judge.

I. Rules 32.10(b) and 33.10(b): The court hears disputes regarding public records requests by special action. These amendments would allow the

judge assigned to a PCR proceeding to hear and decide the records dispute, whether raised by special action or by motion, if it concerns access to public records requested for the PCR proceeding.

J. Rules 32.11(d) and 33.11(d): *Fitzgerald v. Myers*, 243 Ariz. 84, 86 ¶ 1 (2017) held "that neither A.R.S. § 13-4041 nor Rule 32.5 requires a trial court to determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition." However, the Court added that a trial court may order a competency evaluation "if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, certain Rule 32 claims…." These proposed amendments would codify that holding by allowing the trial court to "order a competency evaluation if the defendant's competence is necessary for a presentation of the claim." The proposed amendments intentionally omit a cross-reference to Rule 11 to allow trial judges to fashion an ad hoc process for the infrequent occasions when competency might arise in a post-conviction proceeding.

K. Rules 32.14 and 32.16/33.14 and 33.16: Current Rule 32.9 is titled "review." Current Rules 32.9(a) and (b) pertain to a motion for rehearing in the trial court. Current Rules 32.9(c) through (i) concern a petition for review in an appellate court. The proposed rules bifurcate the provisions of current Rule 32.9 into separate rules, one addressing rehearing and the

other concerning appellate review. The proposed rules are also internally reorganized for better readability.

L. Rules 32.15 and 33.15: Criminal Rule 31.3(b) permits suspension of an appeal to allow the trial court to decide a Rule 24 or Rule 32 issue. That Rule 31 provision also requires an appellant to notify the appellate court when the trial court has decided the issue. This new rule clarifies that when there is a post-conviction proceeding in the trial court concurrently with a pending appeal, defense counsel or a self-represented defendant has a duty to notify the appellate court when the trial court grants or denies post-conviction relief.

M. Rules 32.16(a)(4) and 33.16(a)(4): These rules clarify the process for requesting extensions of time for appellate filings in post-conviction proceedings.

N. Rules 32.17 and 33.17: These rules eliminate the distinction between mandatory testing and discretionary testing of DNA because the Task Force did not find the distinction to be meaningful.

6. Conforming Change to Rule 17.1(e). Rule 17.1(e) currently provides:

> **Waiver of Appeal.** By pleading guilty or no contest in a noncapital case, a defendant waives the right to have the appellate courts review the proceedings on a direct appeal. A defendant who pleads guilty or no contest may seek review only by filing a petition for post-conviction relief under Rule 32 and, if it is denied, a petition for review.

If the Court adopts proposed Rule 33, the reference to Rule 32 in the second sentence of the above provision should be changed to Rule 33.

7. Forms. This petition also requests conforming amendments to certain Rule 41 forms, including Form 23 ("Notice of Rights of Review after Conviction in Superior Court"), Form 24(b) ("Notice of Post-Conviction Relief"), and Form 25 ("Petition for Post-Conviction Relief"). There might be multiple versions of these forms; the specific version the court or the defendant would use would depend on the procedural posture of the case, for example, whether the defendant was found guilty after a trial, or whether the defendant entered a guilty plea. Petitioner believes it would be beneficial to have the guidance of an initial set of public comments concerning the proposed rules before submitting proposed forms, and Petitioner therefore requests a modified comment period. (Blank spaces appear for form numbers in the proposed versions of Rules 32 and 33 shown in the appendix pending the future numbering of these forms.)

8. Request for Modified Comment Period and Conclusion. Petitioner recognizes that this petition proposes significant, substantive changes to Arizona rule provisions regarding post-conviction relief. Public comments might address issues the Task Force has overlooked, or might improve the proposed rules in other ways. Petitioner therefore requests a modified comment period to accommodate the filing of an amended petition after an initial round of public comments. A bifurcated

comment period would permit the Task Force, after considering the initial comments, to submit a revised set of amendments and proposed forms for further public review and comment. After the close of a second round of comments, Petitioner would file a reply and present any additional changes.

Petitioner suggests the following schedule:

February 22, 2019:	First round of comments due
April 5, 2019:	Amended Petition due
May 1, 2019:	Second round of comments due
June 14, 2019:	Reply due

Petitioner requests the Court to: (a) open this petition for comments during the modified periods described above and set new due dates for an amended petition and reply; and (b) abrogate current Rule 32 and associated forms and, subject to modifications proposed by Petitioner's amended petition or reply, adopt proposed new rules and forms for post-conviction proceedings.

RESPECTFULLY SUBMITTED this 10th day of January 2019.

By _____
Hon. Joseph Welty, Chair