Rule 32.1(h): Minority Position Paper

Rule 32.1(h) currently permits relief when "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 beyond a reasonable doubt, or that the death penalty would not have been imposed." The Rule has been applied by one superior court judge to permit relief based on newly-proffered mitigation. *See State v. Miles*, 243 Ariz. 511, 513–14, ¶¶ 8–10 (2018) (declining to resolve whether superior court had correctly interpreted Rule 32.1(h) as permitting relief based only on newly developed mitigation evidence). This interpretation poses a significant threat to finality in capital cases. To rectify this concern, a slim minority of Task Force members supported amending the Rule to permit relief only if a defendant proves that he would not have been found eligible for the death penalty:

> 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 <u>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</u> ~~the death penalty would not have been imposed~~.

Ultimately, however, the majority of Task Force members supported the following amendment:

> the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable factfinder would find the defendant guilty <u>of the offense</u> beyond a reasonable doubt, or that <u>no reasonable fact-finder would have imposed</u> the death penalty. ~~would not have been imposed.~~

Without question, the majority proposal improves the Rule by making clear that it states an objective standard and that a judge may not set aside a death sentence merely because, in his or her subjective view, the mitigation outweighs the aggravation. The majority proposal also is consistent with the Arizona Supreme Court's recent observation that the current Rule should be interpreted to require an

objective standard. *See Miles*, 243 Ariz. at 514, ¶ 11 ("The better reading is that Rule 32.1(h)'s reference to 'the court' means a reasonable sentencer, whether a judge or jury."); *Id.* at 518, ¶¶ 30–32 & n.6 (2018) (Pelander, V.C.J., concurring) (noting Rule's subjectivity as written and opining, "In my view, Rule 32.1(h) is a prime candidate for the [Rule 32] Task Force's consideration."). However, the majority proposal does not resolve the question whether a defendant may carry his burden under the Rule based solely on newly-proffered mitigation—a question that will continue to be litigated. And to the extent the Rule permits a defendant to show his "death-penalty innocence" based on new mitigation evidence, it endangers finality, which is a critical interest Rule 32 specifically safeguards. *See State v. Shrum*, 220 Ariz. 115, 118, ¶ 12 (2009) (preclusion rules "'prevent endless or nearly endless reviews of the same case in the same trial court'") (quoting *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 11 (2002)).

A. *The minority proposal would further Rule 32.1(h)'s purpose and harmonize the Rule with federal law.*

Rule 32.1(h) was designed to address claims of actual innocence. Ariz. R. Crim. P. 32.1(h), 2000 cmt. ("The addition of new subparagraph (h) is warranted by the U.S. Supreme Court's pronouncement that claims of actual innocence are not cognizable under the federal habeas corpus remedy. *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993)."). It contemplates a fact-based inquiry. *See* Ariz. R. Crim. P. 32.1(h) (referring to "the facts underlying the claim"). And courts applying the Rule have recognized that "actual innocence means factual innocence." *State v. Pineda-Navarro*, 2017 WL 4927692, at *2, ¶ 5 (Ariz. Ct. App. Oct. 31, 2017) (quotations omitted); *accord State v. Espino-Torres*, 2017 WL 2871509, *2, ¶ 6 (Ariz. Ct. App. July 6, 2017).

While the existence of a death-qualifying aggravating factor is a factual question, the determination whether a defendant's mitigation is sufficient to warrant a life sentence is not—that process is instead "'inherently subjective' and not the equivalent of a 'mathematical formula.'" *State v. Glassel*, 211 Ariz. 33, 46, ¶ 40 (2005) (quoting *State v. Hoskins*, 199 Ariz. 127, 154, ¶ 123 (2000)); *see State ex rel. Thomas v. Granville (Baldwin)*, 211 Ariz. 468, 473, ¶ 21 (2005) ("[T]he determination whether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is

a sentencing decision to be made by each juror based upon the juror's assessment of the quality and significance of the mitigating evidence.").

This subjectivity is the reason the United States Supreme Court has defined "innocence of the death penalty," for purposes of excusing a successive, abusive, or defaulted federal-habeas claim, as *ineligibility* for death. *See Sawyer v. Whitley*, 505 U.S. 333, 342–43 (1992) (observing that "once eligibility for the death penalty has been established to the satisfaction of the jury, its deliberations assume a different tenor" and, rather than focus on concrete, objectively defined aggravators, the jury makes a highly subjective, discretionary, individualized determination whether death is appropriate). Because the selection of a penalty is subjective, it is nearly impossible to prove by clear-and-convincing evidence how a sentencer "would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury … must be allowed to consider." *Id.* at 346.

Consistent with *Sawyer*, other jurisdictions have required defendants attempting to avail themselves of preclusion-exempt innocence-of-the-death-penalty claims to show their ineligibility for the death penalty. *See Lisle v. State*, 351 P.3d 725, 730–34 (Nev. 2015); *Ex Parte Blue*, 230 S.W.3d 151, 160–62 (Tex. Ct. Crim. App. 2007); *Knight v. State*, 923 So. 2d 387, 411–12 (Fla. 2005); *Bowling v. Com*, 163 S.W.3d 361, 372–73 (Ky. 2005), *abrogated on other grounds by Woodall v. Com.*, __ S.W.3d __, 2018 WL 6560202, *2, *4, (Ky. Dec. 13, 2018); *Clay v. Dormire*, 37 S.W.3d 214, 218 & n.1 (Mo. 2000). And many jurisdictions have defined innocence of the death penalty through statute to require a showing of death-ineligibility. *See* Cal. Penal Code § 1509(d); N.C. Gen. Stat. Ann. § 15A-1415(c); Ohio Rev. Code Ann. § 2953.21(A)(1)(a)(b).

Rule 32.1(h) should be amended consistent with the above authority. Because the sentencing decision is not a "factual" one, a defendant cannot, as a practical matter, show by clear-and-convincing evidence that "the facts" underlying a mitigation-based challenge to his death sentence warrant relief. *See* Ariz. R. Crim. P. 32.1(h). A defendant can, however, show that "the facts" underlying his actual-innocence claim undermine the objective and concrete aggravator(s) that made him eligible for the death penalty. The minority proposal recognizes this reality, as has the United States Supreme Court. The minority

proposal would thus solidify Rule 32.1(h) as a strictly factual Rule and harmonize the Rule with federal law.

B. *The minority proposal would provide greater guidance than the majority proposal and forestall litigation over the Rule's scope.*

As discussed above, the majority proposal admittedly improves the Rule by requiring courts to view sentencing-based Rule 32.1(h) claims objectively. It does not, however, resolve the question whether a defendant can meet the Rule's standard based solely on new mitigating evidence, and thus does not resolve the ambiguity that was the source of litigation in *Miles*. As a practical matter, it is difficult to foresee a situation in which a defendant may obtain relief, under an objective standard, based on an argument that newly-proffered mitigation would have altered a sentencer's subjective, discretionary sentencing decision. *See Sawyer*, 505 U.S. at 346. But that does not mean that defendants will not raise such claims, after expending significant time and taxpayer resources developing them, or that the State will not expend comparable time and taxpayer resources responding to them. This additional litigation, of course, will adversely affect the rights of victims. *See* § (C), *infra*. Expressly limiting the Rule to provide relief only when no aggravation exists would avoid this litigation, eliminate the ambiguity that exists in the majority proposal, and enhance the Rule's reliability and practical functioning.

C. *The proposal would promote finality and reduce the risk of Rule 32.1(h) being used to circumvent Rule 32.1(e).*

In his concurring opinion in *Miles*, Justice Pelander expressed concern about the overlap between Rule 32.1(e)'s newly discovered evidence provision and Rule 32.1(h), and cautioned that "using Rule 32.1(h) as an end-run around Rule 32.1(e)'s due-diligence requirement when, as here, relief is sought decades later based solely on newly discovered mental-health evidence and expert opinions, seems at odds with interests of finality and victim rights." *Miles*, 243 Ariz. at 519, ¶ 35 (Pelander, V.C.J., concurring) (citing Ariz. Const. art. 2, § 2.1(A)(10) & A.R.S. § 13-4401(19)). This is a compelling worry, because Rule 32.1(h) is immune from preclusion and timeliness rules and thus must be narrowly tailored and sparingly applied to prevent it from swallowing those rules. *See Lisle*, 351 P.2d at 731, 734 (if innocence-of-the-death-penalty were expanded to include new

mitigation, "the [actual-innocence] exception would swallow the procedural defaults adopted by the Legislature"). And unlike Rule 32.1(e), Rule 32.1(h) has no diligence requirement to restrain its application.

This concern is amplified where inexact mental-health evidence (which often forms the basis of a defendant's mitigation case) is concerned, as a death-sentenced defendant could file a Rule 32.1(h) claim at any time based on nothing more than a newly-generated expert opinion. *Cf. State v. Pandeli*, 242 Ariz. 175, 192, ¶ 74 (2017) ("We note that opinion testimony often includes subjective components, and good faith disagreements among credible experts are not unusual …"). The Arizona Supreme Court recently limited a defendant's ability to use advances in mental-health evidence to prove Rule 32.1(e)'s elements. *See State v. Amaral*, 239 Ariz. 217, 221–22, ¶¶ 17–19 (2016). But Rule 32.1(h), as currently phrased, contains no such limits and thus permits a defendant to sidestep Rule 32.1(e), *Amaral*, and finality interests by characterizing his claim as one of actual innocence.

Neither the majority nor the minority proposal eliminates the overlap between Rules 32.1(e) and (h). However, the minority proposal reduces that overlap by confining Rule 32.1(h) to concrete factual issues on which mental-health evidence is generally inadmissible. By so doing, the proposal not only facilitates crime victims' rights to a prompt and final resolution of a criminal case, *see* Ariz. Const. art. 2, § 2.1(A)(10), but also advances the twin goals of Rule 32 itself: to safeguard finality and to accommodate "'the unusual situation where justice ran its course and yet went awry.'" *State v. Carriger*, 143 Ariz. 142, 146 (1984) (quoting *State v. McFord*, 132 Ariz. 132, 133 (App. 1982)); *see Shrum*, 220 Ariz. at 118, ¶ 12.

D. ***The minority proposal alleviates any separation-of-powers concerns.***

The Legislature defined the scope of post-conviction relief in A.R.S. § 13–4231, and specified only seven grounds for relief, which also appear in Rules 32.1(a) through (g). Rule 32.1(h) is not one of the statutory grounds—it was added by the Arizona Supreme Court in 2000 after a committee examined and proposed changes to Rule 32. *Miles*, 243 Ariz. 517, ¶ 27 (Pelander, V.C.J., concurring). And the portion of the Rule relating to the death penalty was not contained in the committee's rule-change petition, but was instead "added by [the Arizona

Supreme] Court without circulation for comment and without explanation of its meaning or practical application." *Id.* As a whole, Rule 32.1(h) "has no constitutional or statutory counterpart." *Id.*

The fact that Rule 32.1(h) is a court-created ground for relief raises separation-of-powers concerns, which the Task Force discussed extensively. In the minority view, A.R.S. § 13–4231 is a substantive statute, as it creates the right to obtain post-conviction relief under certain conditions instead of articulating a procedure for enforcing that right. *See Valerie M. v. Ariz. Dept. of Econ. Sec.*, 219 Ariz. 155, 162, ¶ 22 (App. 2008) ("'[I]t is generally agreed that a substantive law creates, defines and regulates rights while a procedural one prescribes the method of enforcing such rights or obtaining redress.'") (quoting *Allen v. Fisher*, 118 Ariz. 95, 96 (App. 1977)). "A change in the substantive law can *only* be given or denied by [the] constitution or the legislature of [this] state." *State v. Fletcher*, 149 Ariz. 187, 191–92 (1986) (quotations omitted); *see also Seisinger v. Siebel*, 220 Ariz. 85, 92, ¶ 26 (2009) (when substantive statute conflicts with procedural rule, statute must prevail); *State v. Fowler*, 156 Ariz. 408, 413 (App. 1987) (if post-conviction statutes create substantive rights, those rights are found in A.R.S. § 13–4231).

Some Task Force members opined that the guilt-beyond-a-reasonable-doubt portion of the Rule could survive a separation-of-powers challenge because it provides a remedy, which is not available in federal court, for a potential constitutional violation. *See House v. Bell*, 547 U.S. 518, 554–55 (2006) (assuming without deciding that "'in a capital case, a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim'") (quoting *Herrera*, 506 U.S. at 417). This in fact appears to be one of the reasons Rule 32.1(h) was added. *See* Ariz. R. Crim. P. 32.1(h), 2000 cmt. Members also argued that affording an avenue for relief where a defendant can show he is ineligible for the death penalty may be constitutionally justified. *See Sawyer*, 505 U.S. at 343. In fact, under Arizona's sentencing scheme, a defendant has both a statutory and constitutional right not to be sentenced to death if the State proves no death-qualifying aggravating factors. *See* A.R.S. § 13–752(E); *Lowenfield v. Phelps*, 484 U.S. 231, 244–45 (1988).

To the extent Rule 32.1(h) presents a separation-of-powers problem, narrowing the Rule in accordance with the Supreme Court's definition of actual innocence of the death penalty, which is the minority proposal, can only help alleviate that problem. Rule 32.1(h)'s current ambiguity (which is not resolved by the majority proposal) has been construed by at least one superior court to permit relief in a situation not contemplated by either the constitution or § 13–4231: when a defendant produces additional mitigation evidence after trial and argues that, had the sentencer heard that evidence, it would not have imposed the death penalty. *See Miles*, 243 Ariz. at 513–14, ¶¶ 8–10. The clarifying language in the minority proposal would thus shore up the Rule against any separation-of-powers challenge by cabining Rule 32.1(h) claims to those that potentially have a constitutional underpinning: claims of actual, factual innocence.