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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-____ **COMMENTS ON PETITION TO AMEND RULE 32**

Kent Volkmer, Pinal County Attorney, hereby submits comments on the 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.

Rule 32.1(c) and Rule 33.1(c). The Sentence Imposed.

The addition of language for Rule 32/33 claimants to challenge their sentence "as computed by the Arizona Department of Corrections" is insufficient to determine the type of claim available. A defendant could easily construe this to contemplate all complaints he might have about any aspect of ADOC's computation of his sentence such as classification for parole eligibility, earned release credits, forfeited release credits or eligibility for release to community supervision. The vague language will be an invitation for many defendants to increasingly challenge their sentence.

Since ADOC is represented by counsel, it would seem that all claims that ADOC has wrongfully recomputed a sentence will be handled by ADOC's lawyers, the Attorney General, and all such claims will be referred to them. County Attorneys are at a distinct disadvantage in defending these claims as they are not privy to how ADOC classifies and computes sentences.

The addition in Rule 33.1(c) of "is not authorized by law **or by the plea agreement**" will result in the State appearing both through the Attorney

General (on ADOC's computation)[1] and the prosecuting agency (on the *Santobello* or other claims)[2] in any given action.

Rule 33.1(e). Newly Discovered Evidence.

Changing "verdict" to "judgment" alters the application of this avenue of relief. Verdict referred primarily to non-pleading defendants. The change is in contravention to A.R.S. § 13-4231 which was drafted for the non-pleading defendant (newly discovered material facts were discovered after

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[1] "As ADOC maintains, it "must determine whether a prisoner is eligible for release pursuant to the terms of a sentencing order," and it is not required to "review the legality of the prisoner's sentencing order." *Stein v. Ryan*, 662 F.3d 1114, 1118 (9th Cir. 2011); *see also* Ariz. R. Crim. P. 26.16(b) (providing "exact terms of the judgment and sentence" to be entered "in the court's minutes" and "no other authority shall be necessary to carry into execution any sentence entered therein")." *State v. Durazo*, (memo decision) 2 CA-CR 2016-0198-PR, 2016 WL 4926135, at *5 (App. Sept. 15, 2016). https://www.westlaw.com/Document/Icd0c62507c6911e6a46fa4c1b9f16bf3/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

[2] In *Durazo*, the defendant claimed his plea agreement provided that his prison sentence would be served at 85% and ADOC had calculated his sentence as 100%-flat-time (the *Santobello* claim). The Pima County Attorney's Office deferred to the Attorney General's Office for response to Durazo's claims. *Id.* at *3. After the trial court denied Durazo relief, he filed a petition for review and a petition for special action. *Id.* at *4. The Court consolidated the two proceedings and it appears only the Attorney General filed a response. *Id.* at *1. As a result, the prosecuting agency's view of the issues discussed is absent, including those that may have pertained to timeliness or preclusion.

the trial, impeachment evidence substantially undermines testimony which was of critical significance **at trial**, would have changed the **verdict**).

Rule 32.2 and Rule 33.2. Preclusion of Remedy.

Preclusion should operate to bring some finality to a criminal conviction. While even the current Rule does not achieve that perfectly, expanding the list of claims that are not precluded in successive petitions will only exacerbate this issue.

Moreover, the proposed change to Rule 32.2/33.2 are in direct contravention of the governing statute. A.R.S. § 13-4232 provides that claims pursuant to A.R.S. § 13-4231(1), (2) and (3) (Rule 32.1(a), (b) and (c)) are precluded in successive petitions for post-conviction relief. The right to litigate the sentence imposed in post-conviction proceedings without limitation does enlarge or modify the substantive rights of a litigant. Rules made by the supreme court, shall not abridge, enlarge or modify substantive rights of a litigant. A.R.S. § 12-109(A).

Rule 32.1(c)/Rule 33.1(c) should be precluded. And if not precluded, a limitation on the number of times a defendant may bring said claim must be imposed.

Rule 32.4(b)(3)(D) and Rule 33.(b)(3)(D). Time for Filing.

The addition of a rule requiring the court to excuse an untimely notice if there is an adequate explanation will undermine the finality of a case. It will provide an opportunity for defendants to continue the litigation of post-conviction relief long after the time this avenue for relief should have been exhausted.

And finality, important without more, is also a right accorded to crime victims. Ariz. Const. Art. II, § 2.1(A)(10). A speedy trial and a prompt and final conclusion to a case after conviction is essential for victim healing. The delay in reaching finality that is already present in the post-conviction process will be aggravated. And for that time, the victims must continue to relive the most traumatic events of their lives.

The trial court should be given discretion in assessing these requests. The word "must" should be changed to "may."

Rule 32.5(a) and Rule 33.5(a). Appointment of Counsel.

Current Rule 32.4(b) is written in the conjunctive, while these proposed rules are not. Without the conjunctive "and" after (a)(1) in both rules, all defendants get court-appointed counsel for their first petition for post-conviction relief regardless of whether or not they are indigent. The

taxpayers are entitled to have the criminal justice system ensure that they are providing counsel only to indigent defendants; they should not be required to shoulder a burden that is not constitutionally theirs. Further, the reference back to Rule 6.1 needlessly confuses a post-conviction defendant's right to continued representation by taxpayer funded court-appointed counsel.

Rule 32.5(c) and Rule 33.5(b). Appointment of Investigators, Expert Witnesses, and Mitigation Specialists.

There may be an argument for the appointment of investigators, expert witnesses and mitigation specialists in post-conviction proceedings on death penalty cases. There is no corresponding argument for this provision in cases where the defendant waived his appellate rights and pled guilty. The trial process was truncated by the plea. It makes no sense to permit a pleading defendant to attempt to litigate his case after he has pled by requesting investigators, experts, and mitigation specialists.

Just as with the discovery provisions discussed below, the incorporation of this pre-trial provision in post-conviction proceedings will discourage offering plea agreements because the benefit of bargain will

inure mostly to the defendant leaving the State to litigate a defendant's case after he/she has pled.

Rule 32.6(b) and Rule 33.6(b). Discovery.

Incorporating pre-trial discovery provisions in post-conviction proceedings unreasonably expands and burdens post-conviction proceedings. These discovery provisions will create an unwieldly demand especially in successive petitions that often occur many years after the initial conviction.[3]

The incorporation of pretrial provisions, such as appointment of investigators, experts, mitigation specialists and discovery, adulterates post-conviction relief by adding elements that will lower both the quality and efficiency that Rule 32 was supposed to bring to the appellate arena. Each Rule 33 petition will be an opportunity for a pleading defendant to attempt to retry portions of his/her case that he/she has come to believe will set them free from the conviction.

[3] For example, in just 7 cases in Pinal County, defendants have filed over 100 pleadings requesting evidence logs, forensic reports, FBI files, tapes, transcripts, forensic reports on devices, e-mails, videos, investigators and experts.

It will also result in litigation of the effect of plea agreement language that provides, "the defendant hereby waives and gives up any and all motions, defenses, objections, or requests which defendant has made or raised, or could assert hereafter, to the court's entry of judgment against defendant and imposition of a sentence upon defendant consistent with this agreement."

Rule 32.11(d) and Rule 33.11(d). Defendant's Competence.

This new rule adds a provision that a court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim. This one sentence provision injects a great deal of uncertainty into post-conviction relief proceedings.

What is "competence" in the post-conviction context? Other looming questions are, will he/she need programming, will he/she need medication, will he/she agree to medication, what if he/she does not want to cooperate at all, what will ADOC need to do to accommodate programming/medication, what if there is no resolution to the question raised about the defendant's mental status? What is the remedy?

The reference to 'competence' will lead courts and practitioners to rely on their Rule 11 experience to guide their conduct. Court-appointed Rule 11

experts and restoration specialists are all required to be certified to practice in this area by the AOC. Their views and approaches are geared to the pre-trial detainee undergoing Rule 11. These views and approaches are not suitable to the post-conviction defendant in a Rule 32. Also, just as they do pre-trial, defendants will look at a provision to test their competency as another tool to attack their conviction.

The Rule, if needed at all, should not refer to competency, but rather mental status. The inclusion of this rule will encourage far more than infrequent use of it.

An Alternative.

If the goal is to 'leave no defendant behind,' an alternative would be to eliminate the overreaching of these proposed rules and instead incorporate a provision providing a trial court with the discretion to grant review and/or relief in those unusual and extraordinary cases where justice may have gone awry.

CONCLUSION

The proposed changes and additions in this Petition will impact the interests of justice served by the plea bargaining process. The benefits of a plea agreement will be significantly offset by the virtually unlimited ability

of a pleading defendant to endlessly litigate post-conviction relief. Contrary to the Task Force's beliefs, Pinal County is certain the proposed changes and additions in this Petition will add substantially to the burden already borne by appellate attorneys, trial courts and appellate courts without a commensurate benefit to justice or defendants.

RESPECTFULLY SUBMITTED This 22nd Day of February, 2019.

PINAL COUNTY ATTORNEY'S OFFICE

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