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-19-0012)) Amended Petition))))))))

Petitioner, the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure ("Task Force"), is submitting this amended petition as provided by the Court's January 15, 2019 Order authorizing a modified comment period. The amended petition includes four appendices, each of which is designated with a number followed by "AP" ("amended petition").

Appendix 1-AP shows a conforming change to Criminal Rule 17.1(e), which was described in Part 6 of the January 2019 petition but was not reproduced in an

appendix. However, rather than merely showing the technical change to this rule noted in the January petition (i.e., changing Rule 32 to Rule 33), Appendix 1-AP is a restyled, superseding version of Rule 17.1(e).

Appendix 2-AP shows redline changes to the version of Rule 32 that Petitioner filed with the January rule petition, and Appendix 3-AP does the same for Rule 33. The changes in Appendices 1-AP, 2-AP, and 3-AP have been highlighted in yellow to make them easier to locate.

Appendix 4-AP contains six proposed forms regarding post-conviction relief.

The Task Force met on March 22, 2019. The meeting included a discussion of comments received during the first comment period, and that discussion is summarized in Part 1 of this amended petition. Parts 2 and 3 of this amended petition discuss changes to Rules 32 and 33 proposed on the Task Force's initiative and not prompted by stakeholder comments. Part 4 includes a discussion of new and revised forms concerning post-conviction relief.

1. Rules Forum Comments. In addition to the distribution of the petition provided in Supreme Court Rule 28(d), staff provided a link to the rule petition and invited comments from the State Bar committee and section on criminal law, several prosecution and defender agencies, and a private criminal defense attorney, but none of these groups or individuals filed comments during the first comment period. In February, the Task Force Chair presented the rule petition to two Supreme Court

standing committees, the Committee on Superior Court and the Committee on Limited Jurisdiction Courts. Each of these committees thereafter filed a comment on the Rules Forum supporting the rule petition. Three substantive comments were filed by attorneys on the Court Rules Forum, and Task Force members discussed each comment at their March 22 meeting.

After reviewing the comment by Katia Mehu, members considered whether to add to the proposed rules a list of constitutional right that might be the subject of relief. Members concluded that there was nothing to add to the rules, or to remove, in response to this comment.

Members discussed a series of comments filed by attorney Linda Moroko on behalf of Aderant (Aderant is a California-based company that provides legal services support and management solutions.) In response to the first portion of the comment regarding Rules 32.6(d) and 33.6(d), members considered changing "may" to "must" [the January version says, "…the court may allow the defendant to file a petition on his or her own behalf"] but thereafter made no change. Regarding Rule 32.7(f) and 33.7(f) and notwithstanding the comment's suggestion, members retained the phrase "return the petition," and noted that Rule 1.7(b)(4) has a specific provision for the effective date of documents filed by an incarcerated defendant. Members disagreed with the observation in this comment that the terms "notice" and "petition" lacked specificity and thought the comment might have originated by

comparing these rules with jurisdictions that do not utilize a notice of post-conviction relief. The Chair directed staff to correct the scrivener's errors noted in the last section of this comment.

Finally, members considered the comment filed by Kent P. Volkmer, the Pinal County Attorney. A member of that office was present during the March 22 Task Force meeting and provided additional input concerning that comment. The first section of the comment, concerning Rules 32.1(c) and 33.1(c), was addressed by modifications members made to those rules earlier in the meeting. See the discussion at pages 5-6, *infra*. The deputy Pinal County Attorney who was present at the meeting opposed Rules 32.4(b)(3)(D) and 33.4(b)(3)(D), which require the court to excuse an untimely notice if the defendant provides an adequate explanation; the Pinal County Attorney believes this should be discretionary. The Pinal County Attorney also opposed Rules 32.5(a) and 33.5(a) regarding the appointment of investigators and mitigation specialists and contended that the current rule does not require this expansion. Members declined to reconsider their previous discussions and decisions concerning these provisions. Similarly, regarding the portion of this comment concerning the discovery rules (Rules 32.6(b) and 33.6(b)), Task Force members agreed that post-conviction discovery had been extensively discussed at prior meetings, and Mr. Volkmer's comment did not persuade them to reconsider their views on this subject.

The Pinal County Deputy Attorney characterized the issue of the defendant's post-conviction competence (Rules 32.11(d) and 33.11(d)) as a very complex issue, distinguished it from issues of defendant's pretrial competence, and contended that it was difficult to capture the nuances of this issue in the context of post-conviction proceedings in a single sentence, as the proposed rules do. The deputy believed that the proposed rule lacks standards and it would therefore be difficult for experts to address the issue in the same manner as experts in pretrial proceedings. If the Task Force retains the provision, the deputy suggested substituting the word "mental status" – which the deputy believes is more flexible – for the word "competence." But members noted that they had discussed Fitzgerald [*Fitzgerald v. Myers*, 243 Ariz. 84 (2017)] at length during their prior meetings, and that "competence" was the word used in that opinion. Accordingly, they declined to make changes to the wording of this provision.

2. Changes to Rule 32 on the Task Force's initiative. Task Force members carefully reviewed their January work product and concluded that several changes were warranted. The proposed changes noted below are those agreed to by the members. Members considered other changes at the March 22 meeting that they rejected. A few of the rejected items are noted below; all the rejected changes are documented in the draft minutes of that meeting.

Rule 32.1 ("scope of remedy/grounds for relief"): Members had concerns whether Rules 32.1(c) and (d) were sufficiently differentiated. To further clarify section (c), members deleted the words "by the judge or as computed by the Arizona Department of Corrections." The words "by the judge" were previously added to section (c) only in juxtaposition to the "Department of Corrections," which has been deleted. Section (c) now simply says, "the sentence as imposed is not authorized by law." A defendant held after the sentence expired or who will be held after the sentence expires would encompass situations in which ADOC has miscalculated the release date, so section (d) is accurate without additional modifications. With the changes described in this paragraph, the comment to Rule 32.1(d) now makes sense and members made no further changes.

Rule 32.2 ("preclusion of remedy"): The proposed language in the January version of Rule 32.2(b) ["claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion…"] is inaccurate because it does not subject (b) through (h) claims to the effect of preclusion if, for example, a (b) through (h) claim was previously adjudicated on appeal. To correct this, members agreed to add "(3)" to the first sentence of Rule 32.2(b) so it reads, "claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3)." With this modification, (b) through (h) claims would be subject to preclusion under Rule 32.2(a)(1) (i.e., still raiseable on appeal or in a post-trial motion) and under Rule

32.2(a)(2) (previously adjudicated on the merits). But (b) through (h) claims are not waived by the defendant's failure to previously raise the claim at trial, on appeal, or in a prior post-conviction proceeding.

Rule 32.5 ("appointment of counsel"): The formatting of Rules 32.5(a) and 33.5(a) varied, and members agreed that they should be identical. Rule 33.5(a) was reformatted accordingly. In addition, a sentence that appeared only in Rule 33.5(a) ["Upon filing of all other Rule 32 notices, the presiding judge may appoint counsel for an indigent defendant"] was added to Rule 32.5(a). Members discussed whether "may" was appropriate in the foregoing provision, or whether it should be "must." Judges noted that self-represented litigants in successive proceedings customarily request the appointment of counsel, even when an appointment is not warranted. The judges noted further that they have the discretion to appoint counsel in those instances and do make those appointments if it is appropriate, even when the defendant has not requested it. Members accordingly concluded that "may" was correct. During a discussion of forms later in the meeting, the word "affidavit" of indigency in these rules was changed to "declaration" of indigency. Members agreed to delete the words "at county expense" from Rule 32.5(c) because the cross-reference in this rule to Rule 6.7 is sufficient, and neither rule requires further enumeration of the specific county accounts from which the expense will be paid.

Rule 32.6 ("duty of counsel, etc."): In proposed Rule 32.6(b), members concluded that the "substantial need" requirement in the first subpart impliedly requires materiality, and they made no revisions to that subpart. The title of Rule 32.6(d) is "defendant's pro se petition." Members agreed to change this to "self-represented defendant's petition." Staff modified the comment to Rule 32.6(c) by deleting references to a "no colorable claims" checklist. Although Rule 33.6 includes such a checklist, Rule 32.6 does not. Members thought this modification was appropriate because a non-pleading defendant has usually had an appeal and possibly an *Anders* review. [*Anders v. California*, 386 U.S. 738 (1967).] Also, that checklist is more useful for post-conviction proceedings involving pleading defendants and to avoid a blanket avowal by counsel that "I reviewed everything" without further specification.

Rule 32.7 ("petition for post-conviction relief"): Members made two changes to section (d) ("declaration"). First, they changed "knowledge and belief" to "knowledge or belief." They also deleted the second sentence of the proposed rule ("The declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations.") Although defendants occasionally attach a separate sheet identifying facts within their knowledge, members concluded that there is little value in this specification and judges usually do not reject a petition that lacks one. Form 25, which is the number of

the current form of the petition for post-conviction relief, as well as the revised Form 25, are congruent with this modification because neither of these forms includes this specification in the defendant's declaration.

Rule 32.8 ("transcript preparation"): Members agreed to change "the trial court proceedings" in section (a) to "the verbal record of trial court proceedings."

Rule 32.14 ("motion for rehearing"): In section (e) ("disposition if motion granted"), members discussed whether it was necessary for the court to "state its reasons" if it reaffirmed its previous ruling. They agreed that it was not and accordingly, the words "in either case" were deleted from the second sentence of that section.

Rule 32.15 ("notification to the appellate court"): Members rephrased this single sentence rule to make it more clear and concise but without changing its substance. They also changed the word "send" to "file." As rephrased, the rule says, "If an appeal of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must file any final rulings in the appellate court within 10 days after the ruling is filed."

Rule 32.16 ("petition and cross-petition for review"): Members recalculated a page limit in section (c): at 280 words per page (see Rule 1.6(b)(1)(E)), a handwritten brief that is the equivalent of 12,000 typed words should be 44 pages, not 50, and the number in Rule 32.16(c) was accordingly corrected. Members also

agreed in section (j) ("transmitting the record to the appellate court") to add the words "to the appellate court" in the first sentence; in section (j) to change "responsive pleadings" to "responses" in the second sentence; and in section (m) ("return of the record") to change "after the petition for review is resolved" to "after the disposition of the petition for review."

Rule 32.17 ("post-conviction DNA testing"): Members revisited their previous revisions, which combined the mandatory and discretionary testing provisions of the current rule into a single provision, and they concurred that this was appropriate. In the last sentence of section (f) ("preservation of evidence"), members removed the words "including criminal contempt for a knowing violation;" the truncated provision simply concludes, "…the court may impose appropriate sanctions." Section (g) requires that a victim be given notification of an unfavorable test result, but some members thought that section (h) concerning test results favorable to the defendant should contain a similar requirement. After discussion, members added a new last sentence to section (h): "If requested, a victim must be given notice of the hearing."

Rule 32.20 ("extensions of time in a capital case; victim notice and service"): In subpart (b)(1), members changed "method" of service to "manner" of service.

3. Changes to Rule 33 on the Task Force's initiative.

Rule 33.1 ("scope of remedy/grounds for relief"): Members added the words "or no contest" to the title of the rule. Members agreed that Rule 33.1(c) and (d) should mirror the revisions the Task Force made today to the corresponding provisions of Rule 32, with the exception that Rule 33.1(c) will continue to include the words "or by the plea agreement." Rule 33.1(f) provides, "the failure to timely file a notice of post-conviction relief was not the defendant's fault." Because Rule 33.4(b)(3) has no time limitation on (b) through (h) claims, the Task Force discussed whether Rule 33.1(f) should apply only to claims under Rule 33.1(a). Members agreed that Rule 33.1(f) only applies to (a) claims, but they declined to make a change to the text of this provision.

The detailed analysis of Rule 33.1(h) [at page 4 of Appendix 4 to the January petition] previously noted a potential need to modify this provision. Members therefore discussed whether Rule 33.1(h) had relevance in the context of a pleading defendant, who waives non-jurisdictional defects and defenses to a criminal charge when entering a plea. They agreed that it did. They recognized that a pleading defendant's decision to enter a plea is often tied to the risk of trial rather than to actual innocence, and a pleading defendant who is actually innocent should have an avenue for relief. One member gave an example of a pleading defendant who is later exonerated by a DNA test (although another member characterized that as a claim

of newly discovered evidence.) Members agreed that Rule 33.1(h) is an extraordinary remedy for rare cases, and they made no changes to the proposed rule.

Rule 33.2 ("preclusion of remedy"): In Rule 33.2(a)(1), after the words "pleading guilty," members added the words "or no contest." Members made a change to Rule 33.1(b) like the change to Rule 32.2(b), i.e., adding (a)(3). Members also noted a concern with the comment. At the time a defendant enters a plea, he or she is not waiving defects or challenges to the subsequent sentence. Accordingly, the Task Force added the words "or to the sentence" at the end of the first sentence of the comment to Rule 33.2(a)(1).

Rule 33.5 ("appointment of counsel"); Rule 33.6 ("duty of counsel, etc."); Rule 33.7 ("petition for post-conviction relief"); Rule 33.14 ("motion for rehearing"); Rule 33.15 ("notification to the appellate court"); Rule 33.16 ("petition and cross-petition for review"); and Rule 33.17 ("post-conviction DNA testing"): Members made or declined to make changes to these rules corresponding to their previous discussion of Rule 32. Members also agreed to propose an amendment to Rule 33.6(c), as shown under the discussion of Form 25(b), the Checklist for No Colorable Claims, *infra*.

4. Post-Conviction Forms. Members discussed six forms at their March 22 meeting. Five of the forms contain modifications to current forms. One of the forms, the no colorable claims checklist, is new. Staff prepared a memo dated March 22,

2019, which detailed the modifications and explained the reasons for these changes. The memo is included with the forms in Appendix 4-AP.

Members had no changes to four of the draft forms: ***Form 23(a)*** (notice of rights after sentencing in the superior court (non-capital)); ***Form 23(b)*** (notice of rights after sentencing in a capital case); ***Form 25*** (petition for post-conviction relief) and ***Form 26*** (defendant's request for the court's record). However, they made changes to two forms.

Form 24(b) is the Notice Requesting Post-Conviction Relief. Members agreed to remove the notary requirement in this form, which appeared after the affidavit of indigency at the bottom of the third page, because it is difficult for an inmate to obtain a notary while confined. Moreover, Civil Rule 80(c) permits a declaration under oath in lieu of a notarized affidavit in most circumstances, and this form should dispense with the notary requirement and permit a declaration. Because of this modification, members agreed to change the word "affidavit" in Rules 32.5(a) and 33.5(a) to "declaration." Members discussed adding either the word "optional" or a checkbox before the request for an attorney but they declined to do so because self-represented defendants will almost always complete this section regardless of those cues, and the court will appoint an attorney when one is warranted.

Form 25(b) is a Checklist for No Colorable Claims for use by counsel for a pleading defendant. Members agreed to add four items to the draft checklist:

- the plea agreement contains the correct classification of offenses and the correct sentencing range of each offense
- any aggravating factors are supported by the record
- the court considered any mitigation evidence that was offered
- if a sentence above the presumptive term was imposed, the court relied on at least one proven statutory aggravating factor

Members further agreed to add these items to the list of factors in the text of Rule 33.6(c).

5. Conclusion. The Task Force has set a meeting on May 10, 2019, to consider the second round of comments. Petitioner will then file a reply with any additional proposed changes, as provided by the Court's January 15, 2019 Order.

RESPECTFULLY SUBMITTED this 5th day of April 2019.

By _____
Hon. Joseph Welty, Chair