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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Supreme Court No. R-19-0012

**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**

**COMMENT OF
THE ARIZONA PROSECUTING
ATTORNEYS' ADVISORY
COUNCIL**

I. BACKGROUND OF PETITION

In 2017, the Criminal Rules Task Force, which proposed a global restyling of the Arizona Rules of Criminal Procedure (Supreme Court No. R-17-0002), recommended that a separate task force be created to examine substantive changes to Rule 32, Arizona Rules of Criminal Procedure. As a result, The Task Force on Rule 32 of the Arizona Rules of Criminal Procedure (hereafter "Task Force") was created, chaired by the Hon. Joseph Welty. On January 10, 2019 the Task Force

1 filed an initial petition which proposed amendments to current Rule 32 and adoption
2 of a new Rule 33. An amended petition was filed on April 5, 2019. The intent of
3 the Task Force proposal is to differentiate post-conviction relief for criminal
4 defendants who were sentenced following a trial or contested probation violation
5 hearing from those who pled guilty/no contest or admitted a probation violation.
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7 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has
8 considered the proposed changes in the amended petition¹ and has four main areas
9 for comment. First, proposed Rule 32.1(h) allows defendants to present new
10 mitigation evidence to allege actual innocence of the death penalty, contradicting
11 *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (holding that actual innocence of the
12 death penalty means that the defendant can prove factual innocence of the
13 aggravating factors or other conditions of eligibility, but not additional mitigation).
14 Second, although the Task Force's petition takes steps to avoid piecemeal litigation
15 by limiting the application of Rules 32.2(b) and 33.2(b), those Rules should require
16 a showing of *good cause* to prevent unnecessary successive petitions. Third, the
17 Task Force's petition creates a new right to prepetition discovery. That right could
18 unnecessarily burden the State with discovery requests for claims that may never
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24 ¹ During a shortened initial comment period, APAAC had insufficient time to hold
25 a committee meeting and present any proposed draft comment to the APAAC
Council for approval.

1 come to fruition. Fourth, the Task Force’s petition may inadvertently require the
2 appointment of defense counsel for successive petitions that raise claims not subject
3 to preclusion. If so, the Task Force’s petition would expand defendants’ rights to
4 appointed counsel. Each of these claims are discussed in detail herein.

6 II. DISCUSSION/ANALYSIS

7 A. Rule 32.1(h) – The Proposed Rule Expands Relief for Claims Based 8 on Actual Innocence in Capital Cases from Aggravating Factors to 9 New Mitigation Evidence.

10 Rule 32.1(h) currently permits relief when “the defendant demonstrates by
11 clear and convincing evidence that the facts underlying the claim would be sufficient
12 to establish that no reasonable fact-finder would find the defendant guilty beyond a
13 reasonable doubt, or that the death penalty would not have been imposed.” The Rule
14 has been applied by one superior court judge to permit relief based on newly-
15 proffered mitigation. *See State v. Miles*, 243 Ariz. 511, 513-14, 8-10 (2018)
16 (declining to resolve whether superior court had correctly interpreted Rule 32.1(h)
17 as permitting relief based only on newly developed mitigation evidence). This
18 interpretation poses a significant threat to finality in capital cases.

21 The Rule 32 Task Force adopted the following amendment to Rule 32.1(h):

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

1 Without question, the Task Force’s amendment improves the Rule by making clear
2 that it states an objective standard and that a judge may not set aside a death sentence
3 merely because, in his or her subjective view, the mitigation outweighs the
4 aggravation. The Task Force’s amendment also is consistent with the Arizona
5 Supreme Court’s recent observation that the current Rule should be interpreted to
6 require an objective standard. *See Miles*, 243 Ariz. at 514, ¶ 11 (“The better reading
7 is that Rule 32.1(h)’s reference to ‘the court’ means a reasonable sentencer, whether
8 a judge or jury.”); *Id.* at 518, ¶¶ 30–32 & n.6 (2018) (Pelander, V.C.J., concurring)
9 (noting Rule’s subjectivity as written and opining, “In my view, Rule 32.1(h) is a
10 prime candidate for the [Rule 32] Task Force’s consideration.”). However, the Task
11 Force’s amendment does not resolve the question whether a defendant may carry his
12 burden under the Rule based solely on newly-proffered mitigation—a question that
13 will continue to be litigated. And to the extent the Rule permits a defendant to show
14 his “death-penalty innocence” based on new mitigation evidence, it endangers
15 finality, which is a critical interest Rule 32 specifically safeguards. *See State v.*
16 *Shrum*, 220 Ariz. 115, 118, ¶ 12 (2009) (preclusion rules “‘prevent endless or nearly
17 endless reviews of the same case in the same trial court’”) (quoting *Stewart v. Smith*,
18 202 Ariz. 446, 450, ¶ 11 (2002)). To rectify this concern, APAAC recommends that
19 the Rule be amended to permit relief only if a defendant proves that he would not
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1 have been found eligible for the death penalty:

2 the defendant demonstrates by clear and convincing evidence that the
3 facts underlying the claim would be sufficient to establish that no
4 reasonable fact-finder would find the defendant guilty of the offense
5 beyond a reasonable doubt, or that no reasonable fact-finder would find
6 the defendant eligible for the death penalty in an aggravation phase held
7 pursuant to A.R.S. § 13-752 the death penalty would not have been
8 imposed.

9 **B. Rules 32.2(b) and 33.2(b) – To Limit Successive Petitions, Rules**
10 **32.2(b) and 33.2(b) Should Require a Showing of “Good Cause”.**

11 Rule 32.2(a) currently states that a defendant “shall be precluded from relief
12 under this rule based upon any ground”:

- 13 (1) still raisable on direct appeal under Rule 31 or in a post-trial
14 motion under Rule 24;
- 15 (2) finally adjudicated on the merits in an appeal or in any previous
16 collateral proceeding; or
- 17 (3) waived at trial, on appeal, or in any previous collateral
18 proceeding.

19 Existing Rule 32.2(b), however, excludes claims raised under Rule 32.1(d)
20 through (h) from the above preclusion provisions. The Task Force’s proposed
21 amendment expands Rules 32.2(b) and 33.2(b) to exempt from preclusion claims
22 under Rules 32.1(b) and (c), and 33.1(b) and (c). To prevent defendants from
23 attempting to relitigate claims that are not subject to preclusion, the Task Force’s
24 April 5, 2019, proposal would limit Rules 32.2(b) and 33.2(b) to exempt only claims
25 precluded by Rules 32.2(a)(3) and 33.2(a)(3), to read follows:

1 Claims for relief based on Rule 32.1(b) through (h) are not subject to
2 preclusion under Rule 32.2(a)(3). However, when a defendant raises a
3 claim that falls under Rule 32.1(b) through (h) in a successive or
4 untimely post-conviction notice, the defendant must explain the reasons
5 for not raising the claim in a previous notice or petition, or for not
6 raising the claim in a timely manner. If the notice does not provide
7 reasons why defendant did not raise the claim in a previous notice or
8 petition, or in a timely manner, the court may summarily dismiss the
9 notice. . . .

10 The April 5, 2019, amendment to Rules 32.2(b) and 33.2(b) improves the
11 Rules by ensuring that defendants cannot relitigate issues that have been finally
12 adjudicated on the merits in a prior proceeding, but the amendment will not prevent
13 defendants from raising new claims in piecemeal petitions. For example, under the
14 Task Force's current amendment, a defendant could file three separate PCR petitions
15 raising claims under Rules 32.1(b) through (h), or 33.1(b) through (h). All three
16 petitions would be exempt from preclusion and presumably permissible unless
17 untimely.

18 To prevent piecemeal litigation, Rules 32.2(b) and 33.2(b) should impose a
19 requirement that defendants show "good cause" for not filing a claim in an earlier
20 petition. A good cause requirement does not foreclose relief for defendants in
21 exceptional cases where there may be valid reasons for raising claims in a successive
22 PCR petition, but it enforces Rule 32's goal to "prevent endless or nearly endless
23 reviews of the same case in the same trial court." *Shrum*, 220 Ariz. at 118, ¶ 12
24 (quoting *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 11 (2002)).
25

1 Therefore, APAAC recommends the following amendment to the April 5,
2 2009, Task Force Proposal for Rule 32.2(b):

3
4 Claims for relief based on Rule 32.1(b) through (h) are not subject to
5 preclusion under Rule 32.2(a)(3). However, when a defendant raises a
6 claim that falls under Rule 32.1(b) through (h) in a successive ~~or~~
7 ~~untimely~~ post-conviction notice, the defendant must ~~explain the reasons~~
8 establish good cause for not raising the claim in a previous notice or
9 petition, ~~or for not raising the claim in a timely manner~~. If the notice
does not ~~provide reasons~~ show good cause why the defendant did not
raise the claim in a previous notice or petition, ~~or in a timely manner~~,
the court may summarily dismiss the notice. . . .

10 And APAAC recommends the same amendment to the April 5, 2019 Task Force
11 Proposal for Rule 33.2(b):

12
13 Claims for relief based on Rule 33.1(b) through (h) are not subject to
14 preclusion under Rule 33.2(a)(3). However, when a defendant raises a
15 claim that falls under Rule 32.1(b) through (h) in a successive ~~or~~
16 ~~untimely~~ post-conviction notice, the defendant must ~~explain the reasons~~
17 establish good cause for not raising the claim in a previous notice or
18 petition, ~~or for not raising the claim in a timely manner~~. If the notice
does not ~~provide reasons~~ show good cause why the defendant did not
raise the claim in a previous notice or petition, ~~or in a timely manner~~,
the court may summarily dismiss the notice. . . .

19 The above amendments also remove references to untimely PCR petitions.
20 These provisions are no longer necessary because the Task Force's proposed Rules
21 32.4(b)(3) and 33.4(b)(3) require that defendants file notices for claims under Rules
22 32.1(b) through (h) and Rules 33.1(b) through (h) "within a reasonable time after
23 discovering the basis for the claim," making the timeliness of the petition a separate
24 inquiry.
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1 **C. Rules 32.6(b) and 33.6(b) – The Proposed Rules Would Allow**
2 **Unnecessary and Burdensome Pre-Petition Discovery.**

3 “Rule 32 itself does not provide a process for obtaining discovery in PCR
4 proceedings.” *Canion v. Cole*, 210 Ariz. 598, 599, ¶ 7 (2005). As *Canion* explained,
5 “Rule 32 sets forth an orderly procedure, beginning with the filing of a notice and
6 petition, that facilitates consideration not only of a defendant’s claims for post-
7 conviction relief, but of discovery requests as well.” *Id.* at 600, ¶ 11. The current
8 procedure affords defendants the opportunity “to be heard” while “protect[ing] the
9 State from random discovery requests.” *Id.* Only after a defendant files a PCR
10 petition can he or she obtain discovery at the discretion of the trial court.
11

12 The Task Force proposes adding Rules 32.6(b) and 33.6(b) with the following
13 new discovery provisions:
14

15 (1) After Filing a Notice. After the filing of a notice, the court upon
16 a showing of substantial need for the material or information to prepare
17 the defendant’s case may enter an order allowing discovery. To show
18 substantial need, the defendant must demonstrate that the defendant
19 cannot obtain the substantial equivalent by other means without undue
hardship.

20 (2) After Filing a Petition. After the filing of a petition, the court
21 may allow discovery for good cause. To show good cause, the moving
22 party must identify the claim to which the discovery relates and
23 reasonable grounds to believe that the request, if granted, would lead to
the discovery of evidence material to the claim.

24 According to the Task Force, these new provisions would “essentially codify”
25 *Canion* but “would also supersede *Canion* by allowing discovery after the filing of

1 a notice but before the filing of a petition.” (Pet. to Amend Rule 32, *filed* Jan. 10,
2 2019, at 12.)

3 APAAC opposes Rules 32.6(b)(1) and 33.6(b)(1). Discovery in PCR
4 proceedings is intentionally limited because “the State is entitled to a presumption
5 that [defendants’] convictions [are] regularly obtained and are valid.” *Canion*, 210
6 Ariz. at 600, ¶ 13. It is incumbent on defendants to raise claims that undermine that
7 presumption before demanding discovery from the State. Until the defendant
8 presents a colorable claim, it is unduly burdensome for the State to litigate discovery
9 requests posed by defendants in PCR proceedings.

12 **D. Rules 32.5(a) and 33.5(a) – The Task Force’s Petition May**
13 **Inadvertently Require Appointed Counsel in Successive PCR**
14 **Proceedings Under Rules 32.5(a) and 33.5(a).**

15 In noncapital cases, current Rule 32.4(b)(2) currently requires that defendants
16 receive appointed counsel in two situations: (1) upon filing a timely notice of PCR
17 or (2) after a defendant files a first notice of PCR. *See Osterkamp v. Browning*, 226
18 Ariz. 485, 489, ¶ 15 (App. 2011). In all other situations, the trial court has discretion
19 to appoint counsel. Ariz. R. Crim. P. 32.4(b)(2); *State v. McDonald*, 192 Ariz. 44,
20 45, ¶ 7 (App. 1998).

22 The Task Force’s proposed Rules 32.5(a) and 33.5(a), which govern the
23 appointment of counsel, are not intended to alter the current application of Rule
24 32.4(b)(2). The Task Force, however, has also proposed time limits for claims filed
25

1 under Rules 32.1(b) through (h) and 33.1(b) through (h). Those time limits may alter
2 the application of proposed Rules 32.5(a) and 33.5(a).

3
4 Post-conviction claims that are not subject to preclusion were previously
5 exempted from the time limits in Rule 32.4. *See* Ariz. R. Crim. P. 32.4(a)(2)(A).

6 Under the Task Force's proposal, a defendant who files claims under Rules 32.1(b)
7 though (h), or 33.1(b) through (h), must file a notice "within a reasonable time after
8 discovering the basis of the claim." Proposed Rules 32.4(b)(3)(B) & 33.4(b)(3)(B).
9

10 To the extent these claims are now considered "timely," the Task Force's proposed
11 Rules 32.5(a) and 33.3(5) could inadvertently require the appointment of counsel in
12 many successive PCR proceedings. Rules 32.5(a) and 33.5(a) should be clarified to
13 prevent this unanticipated consequence. First Rule 32.5(a) should be amended to
14 read:
15

16 **(a) Noncapital Cases.** No later than 15 days after the defendant has
17 filed a ~~timely~~ or first notice under Rule 32.4, the presiding judge must
18 appoint counsel for the defendant if each of the following applies:

- 19 (1) the defendant requests ~~it~~ counsel;
- 20 (2) the defendant is entitled to appointed counsel under Rule
21 6.1(b); and
- 22 (3) there has been a previous determination that the defendant
23 is indigent, or the defendant has completed ~~an~~ a ~~affidavit~~
24 declaration of indigency and the court finds that the
25 defendant is indigent.

Upon filing of all other Rule 32 notices, the presiding judge or

1 the judge's designee may appoint counsel for an indigent
2 defendant.

3 Second, Rule 33.5(a) should be amended to read:

4 **(a) Generally.** No later than 15 days after the defendant has filed a
5 ~~timely~~ or first notice under Rule 33.4, or a notice under Rule
6 33.4(b)(3)(C), the presiding judge must appoint counsel for the
7 defendant if each of the following applies:

- 8 (1) the defendant requests it counsel;
- 9 (2) the defendant is entitled to an appointed counsel under
10 Rule 6.1(b); and
- 11 (3) there has been a previous determination that the defendant
12 is indigent, or the defendant has completed ~~an~~ a
13 declaration ~~affidavit~~ of indigency and the court finds that
14 the defendant is indigent.

15 Upon filing of all other Rule 33 notices, the presiding judge or the
16 judge's designee may appoint counsel for an indigent defendant ~~if~~
17 requested.

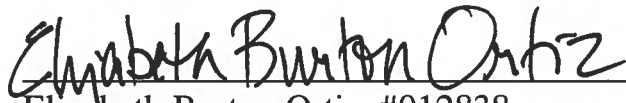
18 Removing references to “timely” filed petitions from Rules 32.5(a) and
19 33.5(a) will ensure that defendants receive appointed counsel consistent with the
20 application of current Rule 32.4.

21 **III. CONCLUSION**

22 The Arizona Prosecuting Attorneys’ Advisory Council recognizes and
23 commends the work of the Task Force on Rule 32 of the Arizona Rules of Criminal
24 Procedure. The Task Force achieved its goal of identifying substantive changes to
25 Rule 32 that improved upon the objectives of the Rule and the post-conviction relief

1 process. APAAC offers the suggestions in this Comment with the intent of
2 strengthening the proposed changes as set forth in the Task Force's petition.

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4 RESPECTFULLY SUBMITTED this 15th day of April, 2019.

5 

6 Elizabeth Burton Ortiz, #012838

7 Executive Director

8 Arizona Prosecuting Attorneys'

Advisory Council

9 Electronic copy filed with the
10 Clerk of the Arizona Supreme Court
11 this 15 day of April, 2019.

12 By: 