

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; | ) Supreme Court No. R-19-0012 |
| TO ADOPT A NEW RULE 33;    | )                             |
| TO AMEND VARIOUS RULE 41   | ) REPLY                       |
| 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                  | )                             |
| _____                      | )                             |

Petitioner, the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure (“Task Force”), submits this Reply pursuant to the Court’s January 15, 2019 Order authorizing a modified comment period.

**1. Introduction and Summary.**

**(A) *Introduction.*** The Task Force met on May 10, 2019, shortly after the close of the second comment period. Its May 10 discussion of the second round of comments is summarized in Part 2 of this Reply. The Task Force also discussed

changes to Rules 17.1, 32, and 33 that the Task Force made on its own initiative; Part 3 of this Reply summarizes that discussion. Part 4 of the Reply discusses the Task Force’s most recent revisions to the six proposed forms.

This Reply includes five appendices, each of which is designated with a number followed by “R” (“reply”) to distinguish these appendices from versions that were previously filed with the petition and amended petition. Appendix 1-R shows recent changes to Criminal Rule 17.1(e). Appendix 2-R shows the Task Force’s redline changes to the version of Rule 32 that was filed with the amended petition in April. Appendix 3-R shows the Task Force’s redline changes to the version of Rule 33 that was filed with the amended petition in April. The changes in Appendices 2-R and 3-R have been highlighted in yellow to make them easier to locate. Appendix 4-R contains versions of the Rules 32 and 33 without redlines. Appendix 5-R contains final versions of the six proposed forms.

**(B) Summary.** Supreme Court Administrative Order No. 2018-07 established this Task Force and directed it to “identify possible substantive changes that improve upon the objectives of Rule 32 and the post-conviction relief process.” The Task Force subsequently identified dozens of changes to Rule 32 that should improve post-conviction proceedings or clarify the process.

As detailed in the January rule petition, the most significant change proposed by the Task Force was eliminating the term “of-right petition,” along with the

companion terms of “pleading defendant” and “non-pleading defendant” that are part of the current nomenclature. The Task Force accomplished this objective by separating Rule 32 into two rules – Rule 32 and a new Rule 33. Revised Rule 32 contains post-conviction provisions only for defendants who proceeded to trial, or who had a probation violation hearing. By comparison, new Rule 33 is exclusively for defendants who entered a plea of guilty or no contest, who admitted a probation violation, or who had an automatic probation violation based on a guilty or no contest plea in another case. Rule 32 and Rule 33 are both self-contained. A defendant will have no need to consult the companion rule during the process of requesting post-conviction relief because each rule provides the necessary provisions for a defendant to initiate and progress through a post-conviction proceeding.

The Task Force proposed other significant substantive changes—described in greater detail in the petition and the amended petition—including the following:

- It clarified the substantive provisions of Rule 32.1(a)-(h)—and new Rule 33.1(a)-(h)—which contain the grounds for post-conviction relief.
- It addressed an issue regarding Rule 32.1(h) noted by the Supreme Court in *State v. Miles*, 243 Ariz. 511 (2018) concerning post-conviction relief from a death penalty.
- It revised the rules on preclusion to permit trial courts to avoid manifest injustice by considering claims, such as lack of subject matter jurisdiction or an unlawful sentence, which the defendant did not previously raise, and which current Rule 32 might otherwise preclude.

- Although the proposed rules retain time limits for raising claims under Rule 32.1(a) and 33.1(a)—the most common claims, for ineffective assistance of counsel, are section (a) claims—they also relax the time for filing (b) through (h) claims. A defendant must file a claim under (b) through (h) within “a reasonable time” after the defendant becomes aware of the basis of the claim.
- It drafted a rule that would allow pre-petition discovery if the defendant met specified requirements.
- It drafted provisions regarding file-sharing and confidentiality when successor PCR counsel appears in a case, and a provision concerning waiver of the attorney-client privilege when the defendant raises a claim of ineffective assistance of counsel.
- The Task Force prepared a list of items appointed counsel must consider before filing a notice advising the court that counsel had reviewed the matter and found no colorable claims.
- It amended rules that address public records requests, a change of judge, and the defendant’s competency in post-conviction proceedings; it amended the rule on DNA testing; it expanded page limits for capital PCR petitions; and it codified the practice of appointing co-counsel for capital post-conviction proceedings.

The Task Force also reorganized individual rules—including but not limited to rules concerning petitions for review—to make them easier to locate and understand. It eliminated unnecessary comments to the current rules. And it prepared forms that more clearly advise defendants of their post-conviction rights and delineate the information they are required to provide to the court when making a request for post-conviction relief. (The proposed rules and a form no longer use

the current term “notice of post-conviction relief.” See for examples current Rule 32.4 and current Form 24(b), which use that phrasing. Instead, the proposed rules and forms refer to a “notice requesting post-conviction relief” which the Task Force believes more accurately describes that document.)

**2. Rules Forum Comments.** Two comments were posted on the Court Rules Forum during the second round of comments.

**(a) APAAC comment.** A comment from APAAC (the Arizona Prosecuting Attorneys Advisory Council) concerned four items.

First, it requested the Task Force to adopt the position of a minority of Task Force members concerning relief from a death penalty under Rule 32.1(h). The Task Force had extensive discussions regarding this issue before filing its petition, the APAAC comment raised no new information, and the Task Force declined to reconsider its previous vote, which was a close one, regarding this provision.

Second, concerning Rules 32.2(b) and 33.2(b), APAAC proposed replacing in the second sentence of these rules the words “explain the reasons” with the words “establish good cause,” and in the third sentence of these rules, replacing “provide reasons” with “show good cause” why the defendant did not previously raise a claim. Some members preferred “establish good cause” and reasoned that the proposed verbiage requiring a defendant to “explain the reasons” for not previously raising an issue does not require that the reason be a good one. But after their discussion,

members concluded that “explain the reason” is what the defendant provides; whether the reason is a good one is what the court decides.

Members also agreed that a trial judge should have flexibility in applying the bar of preclusion to individual sets of facts. The trial court’s determination of the adequacy of the defendant’s reason for not raising the claim in a prior post-conviction proceeding, or in a timely manner, should be on a sliding scale that depends on the grounds for the claim. Grounds such as a lack of subject matter jurisdiction or an excessive sentence should be raiseable at any time without the need for reasons why these claims were not raised earlier. But to address the issue raised by APAAC’s comment, the Task Force agreed to add the word “sufficient” in the second sentence of Rules 32.2(b) and 33.2(b) as follows: “If the notice does not provide sufficient reasons why the defendant did not raise the claim in a previous notice or petition, the court may summarily dismiss the notice...” Although APAAC also proposed deleting references to “untimely” on the basis that timeliness for (b) through (h) claims was no longer pertinent under proposed Rules 32.4 and 33.4, the Task Force retained this verbiage in its final draft to encourage timely filings.

Third, APAAC objected to proposed provisions in Rules 32.6(b)(1) and 33.6(b)(1) that would permit pre-petition discovery. The Task Force previously had lengthy discussions concerning these provisions and it declined to reconsider them.

Fourth, APAAC contended that the Task Force’s revisions to Rules 32.5(a) and 33.5(a) improperly expanded the defendant’s existing right to the appointment of counsel. The Task Force acknowledged that the phrase “timely or first notice” in both rules was confusing. It clarified the provisions by deleting the word “or,” so these provisions now say, “timely first notice.” Members noted that a phrase in Rule 33.5(a) — “or a notice under Rule 33.4(b)(3)(C)” — adequately addresses the appointment of an attorney on a timely second notice challenging the effectiveness of counsel in the first Rule 33 proceeding. The Task Force declined to add the words “if each of the following applies” because that is evident from use of the word “and” in the proposed rule but the Task Force agreed to change the word “it” in subpart (1) to “counsel.” APAAC suggested adding, “Upon the filing of all other Rule 32 [or 33] notices, the presiding judge or the judge’s designee may appoint counsel for an indigent defendant” but the Task Force’s proposed rules already included that sentence.

**(b) SBA comment.** The SBA (State Bar of Arizona) filed a comment contending that Rule 32.6(c), subparts (6) through (11) were redundant to subpart (18). After discussing this contention, the Task Force disagreed. Although it agreed to remove a reference to *Strickland v. Washington* in a comment to this rule, it also agreed to retain the first sentence of the comment, which they believe has value for readers. (That sentence says, “Rule 32.6(c) is intended to assist counsel in reviewing

the record to ensure that substantial justice is done.”) Finally, they agreed to add to the comment to Rules 32.6(c) and 33.6(c) the following, as suggested by the SBA but with slight modification: “Counsel must take care that the Notice of No Colorable Claims does not reveal client confidences to the court without the client’s informed consent. See Ariz. Rules Sup. Ct. 43, E.R. 1.6.”

**3. Changes to the proposed rules on the Task Force’s initiative.** The original R-19-0012 petition requested a simple conforming change to Rule 17.1(e)—changing a cross-reference to Rule 33 rather than Rule 32—and the caption of this Reply continues to refer to Petitioner’s request for a conforming change to Rule 17.1(e). But the versions of Rule 17.1(e) contained in the amended petition and in this Reply request more than a conforming change. With the members’ permission, Task Force staff restyled Rule 17.1(e) before including it as Appendix 1-AP to the amended petition. At the May 10, 2019 Task Force meeting, members further revised the second sentence of this two-sentence rule by deleting the word “however” and by changing the order of the text, but not its substance. This Reply requests adoption of the version contained in Appendix 1-R (shown with redlines).

The Task Force considered the possibility of a conflict between the waiver provisions of Rule 32.2(a) and (b) on the one hand, and Rule 32.16(c)(4) on the other. After discussion, members concurred that waiver applies only to a petition for review of a post-conviction proceeding, and not to an appeal from the original



conviction. However, to further clarify Rule 32.16(c)(4), which refers to a “petition or cross-petition for review,” the Task Force added the words “for review” so it now says, “petition for review or cross-petition for review.”

The Task Force critically reviewed its April 2019 work product and concluded that several other changes were warranted. It agreed to the following revisions:

- In Rules 32.6 and 33.6, it agreed to change the phrase “defendant’s pro se petition” in the titles of these rules to “self-represented defendant’s petition.”
- In Rule 32.16(c)(1), after the words “exceed 12,000 words,” it added the words “if typed.”
- In Rule 32.16(k), it agreed to add “or cross-petition” after the words “the appellate court may grant review of the petition,” and to make a similar change to Rule 33.16(k).
- In Rule 32.17(d)(1)(A), and in the corresponding provision of Rule 33.17, it agreed to add a comma after the words, “would have been more favorable.”
- In Rule 32.17(f), it agreed to substitute “petition under this rule” (which might have ambiguously referred to either Rule 32.17 or to Rule 32 generally) with “petition for post-conviction DNA testing,” and to make a similar change to Rule 33.17(f).
- In Rule 32.19, which refers to “capital cases” in the title but not in the body, it agreed to add in the body of the rule the words “in a capital case” after the words “intellectual disability.”
- In Rule 33.15, it agreed to add the word “final,” so it says, “any final ruling,” which is consistent with the phrasing of Rule 32.15.

Rules 32.13 and 32.14, and the corresponding provisions of Rule 33, alternatively use the terms “ruling” and “decision” to refer to the same thing. After discussion, the Task Force concluded that a change to these provisions was unnecessary. In Rule 32.16(f)(3), the Task Force discussed whether to change a provision that the Reply “may not include an appendix” to “must not” or “should not” include an appendix, but it concluded that “may not” was appropriate.

**4. Post-Conviction Forms.** The Task Force discussed six forms at their March 22 meeting. Five of these forms modify current forms. (Proposed Forms 23(a) and 23(b) are both derived from current Form 23.) One of the forms, the Checklist for No Colorable Claims, is new. The amended petition, which was filed on April 5, 2019, included these six forms as Appendix 4-AP. Members carefully reviewed those forms at their May 10, 2019 meeting, and made further revisions described below.

**Form 23(a) (“Notice of Rights After Sentencing in the Superior Court (Non-Capital)”):** The last substantive section of this form, which is on the second page of the two-page document, is titled “right to apply to have a conviction set aside.” However, the body of that section uses the phrase, “to have the judgment of guilt set aside” in addition to the phrase “to set aside a conviction.” The Task Force considered the terminology used in the governing statute, A.R.S. § 13-907, as well

as colloquial use of the word “conviction,” and concluded that notwithstanding this form’s use of different terms, the proposed text was appropriate.

**Form 23(b) (“Notice of Rights After Sentencing in a Capital Case”):**

Members had no suggested changes to this form.

**Form 24(b) (“Notice Requesting Post-Conviction Relief”):** A notice might concern a case where a defendant was convicted of multiple offenses, and this form now includes additional space for item B-3, which identifies the crime or crimes for which the defendant was sentenced.

**Form 25 (“Petition for Post-Conviction Relief”):** Item 4 of the instructions for this form says in part, “If you do not raise a ground now, you will not be able to raise it later.” Because of the proposed loosening of provisions on preclusion, the Task Force discussed whether this sentence was still accurate. It then agreed to change the word “will” in that sentence to “may.” The Task Force considered whether anything should be added to the form to highlight section 4’s requirement of providing supporting facts and documents. Although members agreed this was an important component of a petition, they did not make any editing changes to emphasize the requirement.

In section 2, which concerns the grounds for relief, the checkbox for Rule 32.1(h) omitted the words, “or that no reasonable fact finder would have imposed the death penalty,” and these words were added. In the previous version of Form

25, section 2, there were multiple blank lines for identifying newly discovered material facts for a Rule 32.1(e) claim, and in section 3, there were additional blank lines for identifying such facts for a Rule 33.1(e) claim. The Task Force agreed to relocate these blank lines as a new item B in part 4. Item B now says, “Identify any newly discovered material facts in support of a claim for newly discovered evidence and specify when the Defendant learned of those facts for the first time and how those facts would have affected the trial or proceeding.” Item A continues to be the location for providing supporting facts and legal authorities for any type of claim. Items B and C of the previous version of this form, which respectively concerned supporting documents or the lack thereof, were renumbered as items C and D.

Another checkbox in section 2 of the prior version was available if the defendant contends that “other rights guaranteed by the United States or Arizona constitutions were abridged or denied.” After discussion, and to avoid misstating a substantive provision, the Task Force agreed to substitute the language of current Form 25: “the abridgement of any other right guaranteed by the constitution or the laws of this state, or the constitution of the United States, including a right that was not recognized as existing at the time of the trial if retrospective application of that right is required.” Section 3 of the form now includes a similar change to the corresponding ground for a Rule 33 claim.

Item 5-B asks for details of previous post-conviction proceedings, including the case number of the prior proceeding. Members observed that case numbers of prior and current proceedings will usually be the same. However, they recognized that on rare occasions, for example, when one petition was filed in an improper venue, they might differ; keeping this detail in item 5-B would be consistent with other items in Section 5. Accordingly, they retained it.

**Form 25(b) (“Checklist for No Colorable Claims (Rule 33)”):** The Task Force made no further changes to this new form.

**Form 26 (“Defendant’s Request for the Court Record”):** The first section of this form requests documents filed with the clerk. The Task Force agreed to retain an item whereby the defendant could request the clerk to omit documents in the presumptive record, even though such requests probably will be infrequent. Attorneys especially might want to omit items when the petition focuses on a narrow issue that does not require the complete record. This section also refers to “reports to the court.” Members thought this would include the presentence report, but for clarity, this section now contains a specific reference to that document. They also discussed whether the phrase “reports to the court” includes competency evaluations. They agreed that it does, but that competency evaluations do not need to be specifically referenced in the form. However, competency evaluations might have been sealed. Form 26 does not unseal a sealed document, so a defendant would

need to file a motion to unseal the competency report if he or she did not already have a copy.

The second section of the form requests transcripts. Most courts record their settlement conferences (Pinal County does not), and the Task Force agreed to add transcripts of settlement conferences in subpart 1 (Rule 32 proceedings) and subpart 2 (Rule 33 proceedings). The Task Force declined to add *Donald* advisements because these are customarily done during another proceeding, such as a pretrial management conference, and there are no separate docket entries for these advisements.

**5. Conclusion.** Petitioner accordingly requests the Court to:

- (A) adopt amendments to Rule 17.1(e) as shown in Appendix 1-R,
- (B) abrogate current Rule 32, and adopt a revised version of Rule 32 as shown in Appendix 4-R;
- (C) adopt new Rule 33, which is also shown in Appendix 4-R,
- (D) abrogate current Form 23 (“Notice of Rights of Review after Conviction in Superior Court”), Form 24(b) (“Notice of Post-Conviction Relief”), Form 25 (“Petition for Post-Conviction Relief”), and Form 26 (“Request for Preparation of Post-Conviction Relief Record”), and
- (E) adopt new 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 24(b) (“Notice Requesting Post-Conviction Relief”), Form 25 (“Petition for Post-Conviction Relief”), Form 25(b) (“Checklist for No Colorable Claims (Rule 33)”), and Form 26 (“Defendant’s Request for the Court Record”), as shown in Appendix 5-R.

Petitioner reminds the Court of the Task Force’s previous request to renumber current Rule 33 (“criminal contempt”) as Rule 35 (currently “reserved”), a change that will accommodate the adoption of new Rule 33.

Members of the Task Force appreciate their opportunity to serve in this endeavor. They believe the proposed rule changes and form revisions are meaningful and will better serve the justice system and the post-conviction relief process.

RESPECTFULLY SUBMITTED this 14th day of June 2019.

By /s/ Joseph Welty  
Hon. Joseph Welty, Chair