



February 22, 2019

Hon. Joseph Welty, Chair
Task Force on Rule 32 of the Arizona Rules of Criminal Procedure
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Re: Petition R-19-0012 - Proposed Rules 32 and 33

Members of the Rule 32 Task Force:

We write to comment on Petition No. R-19-0012 submitted by the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure and to request that clarifying language be added to various proposed rule changes. While we recognize that the Task Force's primary objective is to substantively overhaul Rule 32, we believe that the adoption of new rules is an opportune time to make clear various references in the rules that are otherwise subject to multiple interpretations. This will result in less confusion about expected actions and relevant deadlines amongst counsel, *pro se* defendants, and the courts.

Proposed Rules 32.6(d) and 33.6(d)

Proposed Rules 32.6(d) and 33.6(d) both provide:

Defendant's *Pro Se* Petition. Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for the defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

Although the language of the Proposed Rules is similar to current Rule 32.4(d)(2)(B), the revisions make the rules ambiguous. Under the Proposed Rules, the extension of time for the defendant to file a petition is discretionary and the time to file the petition in the absence of an extension is unclear. A discretionary "extension" is problematic.

Accordingly, we suggest that Proposed Rules 32.6(d) and 33.6(d) be modified to state:

Defendant's Pro Se Petition. Upon the filing of counsel's notice of no colorable claim under subsection (c), the court may allow the defendant to file a petition on his or her own behalf. The time for defendant to file the petition is within 45 days after the date counsel has filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

Other Rules Clarifications

There are a number of instances where we believe the Proposed Rules would benefit from additional language to make the rule unambiguous.

Deadlines Based on Manner of Transmittal of Documents

Several of the Proposed Rules are ambiguous as to the meaning of the manner of transmittal of documents that triggers a deadline for a party to act.

For example, Proposed Rules 32.7(f) and 33.7(f) each provides:

Effect of Non-Compliance. The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 40 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling. [Emphasis added.]

Does a defendant "return" the petition when he or she mails it to the court, or must the court actually receive the petition within 40 days? Since a defendant's failure to meet the deadline could result in the severe consequence of dismissal with prejudice, we respectfully suggest that the rules would be clearer if they stated, for example, that the revised petition must be submitted electronically to the clerk's office within 40 days, or that the court must receive the petition within 40 days.

Similarly, Proposed Rule 32.15 provides:

If an appeal of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must send to the appellate court within 10 days after the ruling is filed any trial court rulings granting or denying relief on the defendant's notice or petition for post-conviction relief, or any motion for rehearing. [Emphasis added.]

It might be prudent to clarify what exactly needs to be done by the 10 day deadline. For example, does "send" encompass simply mailing by the 10th day? Must the document(s) be submitted to the appellate court by the 10th day? We also note that Proposed Rule 33.15 uses the more specific "must file in the appellate court". Accordingly, we suggest that Proposed Rule 32.15 be modified to provide that, within 10 days, the items must be "filed with the appellate court".

Lack of Specificity of the Terms "Notice" and "Petition"

There are also a number of Proposed Rules that refer simply to a "notice" or "petition" without specifying the exact document. Given that the rules apply to *pro se* defendants and counsel who may not be as familiar with the rules as those who use them regularly, we suggest the Proposed Rules add

the full description of the document to avoid any confusion. We provide the following two examples for your reference (our suggested language is bracketed in red).

Proposed Rule 32.7(a)(1)(A)(ii) could state:

A self-represented defendant must file a petition no later than 60 days after the notice [of request for post-conviction relief] is filed or the court denies the defendant's request for appointed counsel, whichever is later.

Similarly, RCRP 32.13(e) would provide:

On a party's request, the court must order the preparation of a certified transcript of the evidentiary hearing. The request must be made within the time allowed for filing a petition for review [of decision on petition for post-conviction relief under Rule 32.16]. If the defendant is indigent, preparation of the evidentiary hearing transcript will be at county expense.

Miscellaneous

We would like to also bring to your attention to two "scrivener's errors" in the proposed rules.

With respect to Proposed Rule 32.16(f), we note that subdivision (g) provides that "Rule 31.3(d) governs the computation of any appellate court deadline in this rule." Thus, there is no need to make the same statement in 31.3(f)(1)(A). Further, including this provision in 31.3(f)(1)(A) and not including it in 31.3(f)(3) may lead to confusion.

Proposed Rule 32.7(a)(2)(C) states in the last sentence: "For good cause and after considering the rights of the victim, the court may grant additional extensions for good cause." We believe the redundancy may have been unintentional.

Thank you for your time and consideration.

Sincerely,



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