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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-19-0012

10 **PETITION TO AMEND RULE 32;**
11 **ADOPT NEW RULE 33; AMEND**
12 **VARIOUS RULE 41 FORMS AND**
13 **ADOPT NEW FORMS;**
14 **RENUMBER RULE 33 OF THE**
15 **ARIZONA RULES OF CRIMINAL**
16 **PROCEDURE; and ADOPT A**
17 **CONFORMING CHANGE TO**
18 **RULE 17.1(e) OF THE ARIZONA**
19 **RULES OF CRIMINAL**
20 **PROCEDURE**

COMMENT OF THE
STATE BAR OF ARIZONA

21 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar
22 of Arizona (the “State Bar”) hereby submits the following as its Comment to the
23 above-captioned Petition.

24 The analysis and details for this Comment are substantially the product of the
25 State Bar’s Criminal Practice and Procedure Committee, composed of a balance of
prosecution and defense practitioners, and judicial members.

1 **I. Background of Petition**

2 In January of 2018, this Court established a Task Force whose mandate was
3 to improve on the objectives of Rule 32, Ariz. Rules Crim. Pro., by identifying and
4 proposing substantive changes to the Rule. (Petition at 3). Petition R-19-0012 is
5 the result of the work of the Task Force.
6

7 **II. Discussion and Analysis**

8 The State Bar of Arizona supports the recommendations of the Petition with
9 some suggestions to modify the proposed Rule 32.6, Ariz. Rules Crim. Pro. These
10 are discussed below.
11

12 Proposed Rule 32 will govern post-conviction cases where the defendant
13 proceeds to trial or a hearing and does not plead guilty or admit to violating
14 probation. Proposed Rule 33 will be the rule governing of-right post-conviction
15 cases where there has been a plea or admission.
16

17 Proposed Rule 32.6(c) mandates the information that must be included in a
18 Notice when counsel determines that there are no colorable claims. The proposed
19 Rule contains 18 subsections detailing the information post-conviction counsel
20 must include in any such Notice. (See, Proposed Rule 32.6(c)).
21

22 An example of the information to be included is the following:
23

- 24 **(6)** Any adverse pretrial rulings affecting the course of the
25 trial (e.g., motions to suppress, motions *in limine*, motions to quash, speedy trial motions);

1 (7) any adverse rulings during trial on objections or
2 motions (e.g., objections regarding the admission of
3 exclusion of evidence, objections premised on
4 prosecutorial or judicial misconduct, mistrial motions,
5 motions for directed verdict);

6 (8) any adverse rulings on post-trial motions (e.g., motion
7 for a new trial, motion to vacate judgment;

8 (9) issues regarding jury selection, if the trial was to a jury;

9 (10) issues regarding jury instructions, if the trial was to a
10 jury;

11 (11) any potential errors for which there were no
12 objections, but which may rise to the level of fundamental
13 error;

14 Proposed Rule 26.6(c)(6)-(11).

15 Proposed subsections (6)-(11) are redundant in light of proposed subsection
16 (18) that requires post-conviction counsel to list any potential claims of ineffective
17 assistance of trial or appellate counsel. Additionally, since the cases under the new
18 Rule 32 will not be of-right petitions for post-conviction relief, but will involve
19 non-pleading defendants, the vast majority of the cases will proceed subsequent to
20 a direct appeal and will involve ineffective assistance of counsel claims. Further,
21 the proposed comment to 32.6(c) states:

22 Rule 32.6(c) is intended to assist counsel in
23 reviewing the record to ensure that substantial justice
24 is done. Failure to complete Form ___, or to identify
25 any issues listed in Rules [sic] 32.6(c) does not
constitute a *per se* deviation from prevailing
professional norms. *See, Strickland v. Washington*,
466 U.S. 668 (1984).

1
2 Petition at Appendix 2.¹

3 There is inconsistency between the directive of proposed Rule 32.6(c),
4 mandating inclusion of a plethora of information regarding legal issues in a Notice
5 of No Colorable Claim, and a comment that implies that failure to follow the
6 dictates of the proposed rule is not a deviation from prevailing professional norms.
7 If the intent of the 18 enumerated subsections is actually to aid post-conviction
8 counsel in “reviewing the record to ensure that substantial justice is done,” as
9 opposed to detailing counsel’s work for the Court, it might be more efficacious to
10 include the enumerated subsections in the comment and identify them as a standard
11 for post-conviction counsel.
12

13
14 Regardless of whether the 18 subsections are intended to aid counsel or the
15 court, with so much information mandated for disclosure, it may well be appropriate
16 to add to the comment a directive that counsel must take care not to reveal client
17 confidences to the court in the Notice without the client’s informed consent. (*See*,
18 *Ariz. Rules Sup. Ct. 42, ER 1.6*).
19

20
21 The forms as submitted with the Amended Petition, propose clarifications
22
23

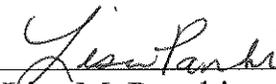
24 ¹ Appendix 2 of Petition R-19-0012 is devoid of any page numbers. Although the
25 proposed quoted language references a form, no proposed forms have been provided
with the initial Petition. (*See, Petition at p. 16, ¶7*).

1 and headings that make them more intuitive for self-represented defendants. A new
2 “Checklist for No Colorable Claims,” Form 25(b), will assist PCR counsel and
3 standardize self-represented petitioners. Similarly, the Request for the Record
4 (Form 26) includes modifications which clarify the form and provide better
5 guidance. The State Bar agrees with and supports these proposed changes.
6

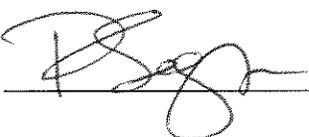
7 **CONCLUSION**

8 For the above-stated reasons, the State Bar of Arizona approves of Petition
9 R-19-0012, with the exception of Proposed Rule 32.6(c) and the comment thereto,
10 and respectfully requests that the Arizona Supreme Court not adopt proposed Rule
11 32.6(c) absent amendments that conform to the concerns raised in this Comment.
12

13
14
15 RESPECTFULLY SUBMITTED this 1st day of May, 2019.

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17 
18 Lisa M. Panahi
19 General Counsel
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21 Electronic copy filed with the
22 Clerk of the Supreme Court of Arizona
23 this 1st day of May, 2019.

24 by: 
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