Rule 32 Task Force

State Courts Building, Phoenix

Meeting Minutes: March 22, 2019

Members attending: Hon. Joseph Welty (Chair), Timothy Agan, Hon. James Beene, Hon. Cathleen Brown Nichols, Hon. Kent Cattani, Hon. Peter Eckerstrom, David Euchner, Jennifer Garcia (by telephone), Hon. Kellie Johnson, Jason Kreag by his proxy Carlos Carrion, Dan Levey, Michael Mitchell, Hon. Samuel Myers, David Rodriquez by his proxy Geri Roll, Hon. James Sampanes, Mikel Steinfeld, Lacey Stover Gard (by telephone), Hon. Danielle Viola, Hon. Rick Williams [all members present in person, by telephone, or by a proxy]

Guests: John Todd, Colleen Clase, Kathryn Andrews, Tim Geiger (by telephone)

Task Force Staff: Beth Beckmann, Mark Meltzer, Angela Pennington, Susan Pickard, Theresa Barrett

1. Call to order; introductory remarks; approval of meeting minutes. The Chair called the sixth Task Force meeting to order at 12:35 p.m. The Chair noted that the Task Force's rule petition R-19-0012 was filed on January 10, 2019. The petition included changes the Chair made on the members' behalf and in furtherance of their discussion at the December 4, 2018 meeting. After filing, staff provided a link to the rule petition, and invited comment from, the State Bar committee and section on criminal law, several prosecution and defender agencies, and a private criminal defense attorney, but none of them filed comments during the first comment period. In February, the 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. The Chair also briefed the Chief Justice and the AOC's Administrative Director on the petition's proposed changes.

The Chair asked members to review the December 4, 2018 meeting minutes. There were no corrections and a member made the following motion:

> **Motion:** To approve the December 4, 2018 minutes. The motion received a second and it passed unanimously. **R32TF: 007**

The Chair then advised that today, members would consider staff's notes and proposed changes to the rules, items on the Rules Forum, and new drafts of post-conviction forms.

2. Staff's notes concerning Rules 32 and 33. Staff annotated Rules 32 and 33, as filed in January, with several concerns and suggested changes. Members reviewed these notes, beginning with the notes in Rule 32. (This agenda item did not include a discussion of every rule provision, but only those noted below.)

Rule 32: Staff proposed adding the words "or a contested probation violation hearing" to the title of Rule 32. Members agreed with that change.

Rule 32.1 ("scope of remedy/grounds for relief"): Staff expressed concern about whether Rules 32.1(c) and (d) were sufficiently differentiated. Members again noted that the phrase in current Rule 32.1(c), that the sentence exceeds the maximum, is encompassed within another phrase that a sentence is not authorized by law, so the phrase about exceeding the maximum was appropriately deleted. 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 ADOC, which has now also 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 circumstances 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"): Staff's note suggested that the proposed language in 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. Members generally agreed that section (b) required modification. One member proposed adding "(3)" to the first sentence of Rule 32.2(b) so it would read, "claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3)." Staff suggested adding the words, "but are subject to preclusion under Rules 32.2(a)(1) and (2)," but members thought the carve-out of (a)(3) was sufficient without this additional language. Members felt that with this modification, it would be clear that claims under (b) through (h) would be subject to preclusion under Rule 32.2(a)(2) (previously adjudicated on the merits). But a claim that falls under (b) through (h) will not be waived by the defendant's failure to raise it at trial, on appeal, or in a prior post-conviction proceeding. The only change to Rule 32.2, therefore, was adding "(3)" to section (b).

Rule 32.3 ("nature of a post-conviction proceeding and relation to other remedies"): Staff asked whether the rule or a comment to the rule should provide guidance when a defendant pleads guilty to an offense but proceeds to trial on an aggravator, i.e., would that be a Rule 32 or a Rule 33 proceeding? This situation arises under current Rule 32, and case law has already addressed it, so that case law should be sufficient guidance under the proposed rules, too. Moreover, this issue would most likely occur in a capital case, and under the proposed rules, Rule 32 would expressly and exclusively apply. Members agreed that no change was necessary.

Rule 32.4 ("filing a notice requesting post-conviction relief"): A comment to the proposed rule advised that an appeal may be suspended pending the trial court's resolution of a post-conviction proceeding, but it doesn't address the converse, i.e., suspending the PCR in the trial court pending disposition of the appeal. Members concurred that the rule does not need to address this; the court inherently has authority to do this, or it can dismiss the post-conviction proceeding without prejudice pending the outcome of the appeal.

Rule 32.5 ("appointment of counsel"): Staff noted that the formatting of Rules 32.5(a) and 33.5(a) varied. Members agreed that they should be identical, and 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. They pointed out that judges have the discretion to appoint counsel under those circumstances, and do make those appointments, just as they may appoint counsel when it is appropriate and the defendant has not requested it. Members concluded that "may" was correct. During a discussion of forms later in the meeting, the word "affidavit" of indigency in these rules was changes to "declaration" of indigency." In Rule 32.5(c) ("appointment of investigators, etc.") members declined to change "reasonably necessary" to "reasonable and necessary," and noted that "reasonably necessary" is the term utilized in current Rule 6.7(a) ("appointment of investigators, etc."). 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 any further enumeration of the specific county accounts from which the expense will be paid.

Rule 32.6 ("duty of counsel, etc."): Proposed Rule 32.6(b), which concerns discovery, has two subparts, one for discovery after the defendant has filed a notice but before a petition is filed, and the other for discovery after the petition is filed. Staff noted that the second subpart contains a "materiality" requirement, but the first subpart does not, and staff proposed adding it. 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. While Rule 33.6 includes such a checklist, Rule 32.6 does not. Members thought this omission was appropriate because a non-pleading defendant has usually had an appeal and possibly an *Anders* review. 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 and also the revised form, are already congruent with this modification because these forms do not include this specification in the defendant's declaration. Staff also inquired whether Rule 32.7(f) ("effect of non-compliance") included within its ambit a failure to comply with Rule 32.7 concerning attachments. Members agreed that it did and that no further clarification of this point in the rule was necessary.

Rule 32.8 ("transcript preparation"): Staff suggested changing "the trial court proceedings" in section (a) to "the verbal record of trial court proceedings," and members concurred.

Rule 32.14 ("motion for rehearing"): In section (e) (("disposition if motion granted"), staff asked if it was necessary for the court to "state its reasons" if it reaffirmed its previous ruling. Members 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 one sentence rule to make it more clear and concise but without changing its substance. 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 agreed with staff's calculation 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 was accordingly corrected. Members also agreed with staff's editing changes in section (j) ("transmitting the record to the appellate court") by adding the words "to the appellate court" in the first sentence, and changing "responsive pleadings" to "responses;" and to a change in section (m) ("return of the record") which changed "after the petition for review is resolved" to "after the disposition of the petition for review."

Rule 32.17 ("post-conviction DNA testing"): Members saw no need to expand on the meaning of "State" because existing case law on discovery would be applicable. They also saw no need to add a reference to indigency for the payment of lab costs because that is a factor the court would consider as a matter of course. Members revisited their previous revisions, which combined the current 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." In section (g), which concerns unfavorable test results, members declined to add references to other databases in deference to those who are more familiar with suitable database designations, although they considered changing subpart (d)(2) to say, "an appropriate database." Section (g) requires that a victim be given notification of an unfavorable test result, but a member suggested 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"): Staff suggested that subparts (b)(1) and (b)(2) conflict because if the victim has not specified the manner of service, one subpart requires service by regular mail and the other requires service through the prosecutor's office. Members did not consider these provisions to be conflicting, but in subpart (b)(1), the changed "method" of service to "manner" of service.

Rule 33: Members discussed the following provisions.

Rule 33.1 ("scope of remedy/grounds for relief"): Members discussed three sections of this rule. (1) Rules 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." (2) 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, should Rule 33.1(f) apply only to claims under Rule 33.1(a)? Members agreed that Rule 33.1(f) has application to (a) claims only, but they declined to make a change to the text. (3) Does Rule 33.1(h) have relevance in the context of a pleading defendant, who waives non-jurisdictional defects and defenses to a criminal charge when entering a plea? Members agreed that it did. They recognized that a pleading defendant's decision is often tied to the risk of trial rather than to whether a defendant is actually innocent, 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"): Members made a change to Rule 33.1(b) like the change to Rule 32.2(b), i.e., adding (a)(3). A member also noted a concern with the comment. A defendant at the time of entering a plea does not waive defects or defenses to the subsequent sentence. Members agreed and 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 changes, or declined to make changes, to these rules corresponding to their previous discussion of Rule 32, with certain notes as follows. In Rule 33.14, the rule is correct as written, i.e., the court can grant a pleading defendant a "new trial," even though there was not a previous trial. In Rule 33.15, "send" will be changed to "file" in this rule and in Rule 32.15. Rule 33.16(a)(4) and Rule 32.16(a)(4) should be uniform, and each of these provisions should have two subparts. Rules 33.17 and 32.17 should be identical.

3. Rules Forum comments. Three substantive comments were filed on the Court Rules Forum, and members discussed each comment.

Ms. Mehu's comment: After reviewing the comment, members considered whether to add to the 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.

Ms. Maroko's (Aderant's) comment: In response to the first portion of the comment regarding Rules 32.6(d) and 33.6(d), staff recommended changing "may" to "must" [now, "…the court may allow the defendant to file a petition on his or her own behalf."] Members disagreed with staff's recommendation and 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.

Mr. Volkmer's comment: The Chair noted that the first section of the comment, concerning Rules 32.1(c) and 33.1(c), had been addressed by modifications members had made to those rules earlier in the meeting. Ms. Roll, a deputy Pinal County Attorney who was present as proxy for Mr. Rodriquez, facilitated a discussion of the other portions of the comment filed by Mr. Volkmer, the Pinal County Attorney. She opposed Rules 32.4(b)(3)(D) and 33.4(b)(3)(D) that require the court to excuse an untimely notice if the defendant provides an adequate explanation; she believes this should be discretionary. She also opposed Rule 32.5(a) and 33.5(a) regarding the appointment of investigators and mitigation specialists, because she did not believe the current rule required this expansion. The Chair asked members if they wanted to reconsider their previous discussions and decisions concerning these provisions, but none answered affirmatively. Similarly, the Task Force's response to the portion of this comment concerning the discovery rules (Rules 32.6(b) and 33.6(b)), was that this subject had been extensively discussed at prior meetings, and Mr. Volkmer's comment did not persuade members to reconsider their views on these rules. Ms. Roll 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 pre-trial competence, and contended that it was difficult to capture the nuances of this post-conviction issue in a single sentence, as the proposed rules do. She believed that the proposed rule lacks standards and it is therefore difficult for experts to address the issue in the same manner that they do pretrial. If the Task Force retains the provision, she suggested substituting the word "mental status" – which she believes is more flexible – for the word "competence." But members noted that "competence" was the word used in the *Fitzgerald* opinion and that this issue had been discussed at length during previous meetings. Members declined to make changes to this provision.

4. **Other rule petitions.** Two other petitions were filed during the current rules cycle that requested changes to Rule 32, and those were considered during the meeting.

Rule petition R-19-0008 was filed by the Maricopa County Attorney and seeks to modify various rules relating to juror privacy. (A similar but not identical petition was previously filed by that office, R-14-0008, which the Court denied.) The proposed amendment to Rule 32.1 would add a process for the court to permit contact with a juror who had previously refused post-verdict contact. Because the provision did not directly impact the process for post-conviction relief, and the Task Force took no position on the proposal.

Rule petition R-19-0016 was filed by the Arizona Voice for Crime Victims. Like a previous petition filed by the AVCV (R-18-0001), the petition seeks to abrogate Rule 39 and integrate victims' rights throughout the criminal rules. Ms. Clase offered remarks on behalf of the AVCV and advised the members that the recent petition sought to address stakeholder concerns with

the earlier proposal. The Chair noted that the Criminal Rules Task Force petition, R-17-0002, had previously added victim notification provisions in Rule 32 to emphasize victims' interest in the finality of the post-conviction process, and members agreed that the additional changes to Rule 32 proposed in R-19-0016 were unnecessary.

5. **Forms.** Members then discussed six forms that were in the meeting materials. The materials included a staff memo that detailed the modifications to these forms and explained the reasons for these changes.

Form 24(b) is the Notice Requesting Post-Conviction Relief. A member asked to remove the notary requirement in this form following the affidavit of indigency at the bottom of the third page. because it is difficult to obtain a notary while confined. Also, 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. Members agreed to this change, and 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 the Checklist for No Colorable Claims. At a member's suggestion, the Task Force agreed to add four items to the 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 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)

Given the lateness of the hour, members offered no comments concerning 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). The Chair will determine whether to include forms in the amended rule petition. He asked members to carefully review the forms before the May 10 Task Force meeting.

6. **Roadmap.** **T**he Chair noted that he and staff would draft and file an amended petition and would make appropriate corrections in the revised rules and appendices, including grammatical and syntactical edits. He asked members for their authority to do so. Members unanimously agreed that he had that authority.

The Task Force will file its amended petition by April 5, and the amended petition and revised rules will be opened for a second round of comments. The second comment period closes on May 1. The next Task Force meeting is set for Friday, May 10, 2019, beginning at 10 a.m.

7. **Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 5:03 p.m.