Rule 32 Task Force

State Courts Building, Phoenix

Meeting Minutes: December 4, 2018

Members attending: Hon. Joseph Welty (Chair), Timothy Agan, Hon. James Beene, Hon. Kent Cattani, Hon. Peter Eckerstrom, David Euchner, Jennifer Garcia by her proxy Ellie Hoecker, Jason Kreag, Dan Levey, Michael Mitchell, Hon. Samuel Myers (by telephone), David Rodriquez, Hon. James Sampanes, Mikel Steinfeld by his proxy Grace Guisewite, Lacey Stover Gard, Hon. Danielle Viola

Absent: Hon. Cathleen Brown Nichols, Hon. Kellie Johnson, Hon. Rick Williams

Guests: Kathryn Andrews

Task Force Staff: Beth Beckmann, Mark Meltzer, Angela Pennington

1. **Call to order; introductory remarks; approval of meeting minutes.** The Chair called the fifth Task Force meeting to order at 10:09 a.m. and introduced the proxies. He then asked members to review the November 9 draft meeting minutes. There were no corrections and a member made the following motion:

> **Motion:** To approve the November 9, 2018 minutes. The motion received a second and it passed unanimously. **R32TF: 005**

The Chair noted the contents of today's meeting packet included comparison versions of the draft rules. He advised that today's meeting would focus on a section-by-section review of the most recent drafts of Rules 32 and 33.

2. Review of draft Rules 32 and 33. The most recent drafts of Rules 32 and 33 were identified as the November 9, 2018 versions. The Chair requested Judge Cattani to provide an overview of these drafts, beginning with Rule 32.1.

Rules 32.1 and 33.1 ("scope of remedy"): Judge Cattani made a few suggested edits to Rules 32.1 and 33.1 after the November 9 meeting, which are shown in the materials by strikethrough and underline. Rule 32.1 no longer includes provisions that pertain to pleading defendants, except for pleading defendants in capital cases. Provisions that pertain to pleading defendants are in Rule 33.1. There is a significant revision to section (c) of both rules. Rule 32.1(c), as most recently modified by Judge Cattani, provides a remedy when "the sentence is not authorized by law." Rule 33.1(c) provides a corresponding remedy when "the sentence is not authorized by law or by the plea agreement." Members had no objection to the additional words, "or by the plea agreement," in Rule 33.1(c).

Members discussed the application of these sections to a recurring situation where the defendant is sentenced with an expectation that he or she will receive good-time credits ("GTC"), but the Arizona Department of Corrections ("ADOC") thereafter computes a release date based on statutory requirements for flat time. The ADOC typically receives only a sentencing minute

entry, whereas the expectation of GTC may be memorialized in a written plea agreement or in the reporter's transcript of a change-of-plea or sentencing proceeding.

A member asked whether a defendant's claim under the foregoing circumstances would be under section (c) or section (d) ("the defendant continues to be or will continue to be in custody after his or her sentence expired"). The member noted that the claim does not challenge the sentence, but rather it challenges the way it is carried out by the ADOC. The member's concern is that a section (c) remedy might result in the defendant being resentenced, possibly to a longer term, whereas a section (d) remedy would enforce the sentence as the court and parties intended. Another member asked whether the recently added words in (d) ("the defendant continues to be or will continue to be held in custody after his or her sentence has expired") which expands application of the subsection so that relief can be obtained before the sentence has allegedly expired, would address the member's expressed concern. The member replied that it did not. A judge member then suggested adding these words to section (c): "the sentence as imposed by the judge or as computed by the Arizona Department of Corrections is not authorized by law [and, in Rule 33.1(c), 'or by the plea agreement'.]" Although the first member thought this might conflict with Rule 24.3, which gives the trial court only 60 days to modify a sentence, the judge member believed this new section (c) language would give the court jurisdiction to take appropriate remedial action, and will permit the court to give the defendant, when appropriate, the benefit of the plea bargain. Members agreed and approved these modifications to section (c).

Members then discussed revisions to section 32.1(e) and 33.1(e). First, in both rules, the word "probably," ("newly discovered material facts probably exist, and those facts probably would have changed…"), which is in the existing rule but was deleted in the proposed versions of Rules 32 and 33, was restored after members expressed concerns that removal narrowed the scope of relief and heightened the burden for defendants. Second, the word "judgment" replaced the word "verdict" in the current version of Rules 32.1(e) and was added to the proposed version of 33.1(e), which initially limited relief to the sentence. Both provisions now say, "probably would have changed the judgment or sentence," and in the final version these phrases will be identical.

Similarly, the members agreed to replace the word "conviction" in current Rule 32.1(g) with "judgment" ("would probably overturn the defendant's conviction or sentence") and to add the word "judgment" to the proposed version of Rule 33.1(g), which in the draft limited relief to the sentence. Both versions now read, "there has been a significant change in the law that . . . would probably overturn the defendant's judgment or sentence."

The November 9 draft did not include Mr. Steinfeld's proposed language for Rule 32.1(h), which members agreed on during the November 9 meeting (see the November 9 meeting minutes, at page 4 of 6). The approved language was substituted in the draft. In Rule 33.1(h), members removed the words, "the defendant would not have pled guilty," because they duplicated the intended effect of revised Rule 33.1(e). Judge Cattani noted that he deleted the comment to Rules 32.1(c) and 33.1(c) because the comment restated the rule and was not otherwise helpful. Members concurred with the deletion.

Rules 32.2 and 33.2 ("preclusion of remedy"): Judge Cattani explained the differences in these two rules. Among them, Rule 32.2(a) contains a provision about claims still raiseable on

appeal, which is not in Rule 33.2 because a pleading defendant does not have a right to direct appeal; whereas Rule 33.2(a) includes a provision about claims waived by pleading guilty, which is not in Rule 32.2. A member was concerned about the possible impact of these provisions on a defendant who proceeded to trial on certain counts but entered guilty pleas on other counts. Members agreed to add to Rule 33.2 the words, "waived by pleading guilty to the offense" to clarify that a defendant in those circumstances would not be precluded from raising post-conviction claims arising from the trial. The Chair would be interested in public comments on this provision.

Members also discussed Judge Cattani's proposed comment to Rule 33.2(a)(1) concerning claims a defendant waives by a guilty plea. To reflect case law, Ms. Beckmann suggested changing the phrase "acceptance of the plea" in the proposed comment to "validity of the plea." Members agree to "acceptance or validity of the plea," but they declined to add similar language to the body of the rule. Members also considered adding a second sentence to Judge Cattani's comment to further clarify what a defendant can and cannot constitutionally waive by entering a guilty plea. After discussing suggested versions, members agreed on the following: "This provision is not intended to expand or contract what is waived by the entry of a plea under current case law."

Another issue arose later in the meeting about whether the current language of Rule 33.2 could be interpreted to preclude a pleading defendant from bringing a successive claim challenging the effectiveness of PCR counsel in the first petition (i.e., another Rule 33.1(a) claim.) Members agreed that Rule 33.2 should clarify that such claims are an exception to preclusion. Members accordingly made two changes to Rule 33.2(b). First, they relocated language in the November 9 draft of Rule 33.2(b) as a new subpart (b)(1) and titled this subpart "generally." Subpart (b)(2), which is new, has the title, "ineffective assistance of post-conviction counsel." It provides, "A defendant is not precluded from filing a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding."

Rules 32.3 and 33.3 ("nature of a post-conviction proceeding and relation to other remedies"): The current rule, and a comment to the November 9 version, refer to habeas corpus, but the body of November 9 draft of this rule does not. Some members were concerned that an unintended consequence of this omission in the November 9 draft of the rule might be an increased volume of extraordinary writs. Others were concerned that the November 9 draft might result in treating Rule 24 motions as Rule 32 petitions. Members therefore made two revisions to Rules 32.3 and 33.3. First, in section (b) ("other applications or requests for relief"), members added the underlined words: "If a court receives any type of application or request for relief, however titled, which challenges the validity of the defendant's conviction or sentence…." Second, they added a sentence to the comment that says, "This rule does not limit remedies that are available under Rule 24."

Rules 32.4 and 33.4 ("filing a notice requesting post-conviction relief"): These rules include provisions on the time for filing a notice of post-conviction relief. The drafts provide that claims on the grounds specified in (b) through (h) of the respective rules must be filed "within a

reasonable time after discovering the basis of the claim." Members discussed whether to modify "reasonable time" to a specific time, such as 90 days from when the defendant learns about the claim. They declined to do this. They concluded that what is reasonable might vary, based on the facts and circumstances of each case, like the concept of "due diligence" for claims of newly discovered evidence under Rule 32.1(e) and 33.1(e). Another member was concerned that if the defendant knew of facts underlying a claim yet not their legal significance, and accordingly did not raise the claim previously, the defendant might be barred from raising a legitimate claim, such as lack of subject matter jurisdiction, later in the proceeding. But a judge member noted that the draft rule requires that the defendant had actual knowledge of the claim, and not that the defendant should have known about it. Moreover, the reasonable time provision is intended to promote finality, and not to bar meritorious claims.

There is also a subpart in both rules about excusing an untimely notice for claims under Rules 32.1(a) and 33.1(a); these claims have a time requirement. The draft showed this subpart with strikethrough. Members revised the draft. It now allows the court to excuse an untimely notice "if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." Members discussed whether this was redundant to Rule 33.1(f); they agreed it was not because, among other things, Rule 33.4 requires an adequate explanation, which is not mentioned in Rule 33.1(f). The relevant portion of Rule 33.4 provides that the court "may" excuse an untimely notice. A member suggested changing this to must, because if the defendant provides an adequate explanation, the court has no discretion to dismiss an untimely notice. Members agreed.

Rule 32, subpart (b)(4)(C), provides that if an appeal is pending, the trial court clerk is required to notify the appellate court of the filing of a PCR notice and the trial court's final ruling in the PCR proceeding. Members agreed to delete only the requirement that the clerk notify the appellate court of the trial court's final ruling because that provision conflicts with Rule 32.15. There is no corresponding provision in Rule 33 because there should be no appeal following the entry of a guilty plea.

Rules 32.5 and 33.5 ("appointment of counsel"): Members raised two issues. The first issue concerned language in the current draft that required the trial court to appoint counsel "after the defendant has timely filed a notice…." Members agreed that this was incomplete and changed the provision to now require the appointment of counsel "after the defendant filed a timely or first notice." The second issue concerned the omission of a requirement that defendant is entitled to appointed counsel. Members accordingly added to both rules the following: "the defendant is entitled to appointed counsel under Rule 6.1(b) ["right to a court-appointed attorney"]." Section (a) was reformatted so the requirements are in a list of three items.

Rules 32.6 and 33.6 ("duty of counsel; defendant's pro se petition; waiver of attorney-client privilege"): These revised rules include a provision that is not found in current Rule 32, concerning discovery in a PCR proceeding. In *Canion v Cole,* the Supreme Court allowed discovery in a post-conviction proceeding after the defendant filed a post-conviction petition upon a showing of good cause. Members previously agreed that the court should allow discovery at an earlier stage, specifically, after the filing of a notice. (See the discussion at pages 3-4 of the

August 31, 2018 meeting minutes.) The November 9 draft of these rules accordingly included a section (b) that allowed pre-petition discovery on a showing of good cause. The Chair reminded members that they had previously discussed different standards depending on whether the discovery request was made before or after the filing of a petition. Before proceeding, the Chair took a straw vote to reconfirm the members' decision at the August 31 meeting. Seven members supported pre-petition discovery, and seven opposed it. The Chair broke the tie by supporting pre-petition discovery in appropriate circumstances.

However, the Chair believed, and members concurred, that the standard for pre-petition discovery should be higher than for post-petition discovery. Members accordingly agreed to separate section (b) of these rules into two subparts. Subpart (1) will address discovery after filing a notice. It requires a showing of substantial need and includes text based on Rule 15.1(g) ("disclosure by court order.") A new comment to the rule confirms that the standard for pre-petition discovery derives from Rule 15.1(g). Subpart 2 addresses discovery after filing a petition. The text of subpart (2) will be taken from the November 9 draft and requires a showing of good cause.

Members modified the November 9 version of Rule 33.6(e) ("counsel's notice of no colorable claims") by deleting the erroneous reference to an avowal and substituting language that is identical to Rule 32.6(e) ("In the notice, counsel should also identify the following….")

Rules 32.7 and 33.7 ("petition for post-conviction relief"): Rule 32.7(c) addresses the length of petitions. It provides a 28-page limit for non-capital cases and an 80-page limit for capital cases.

The Criminal Rules Task Force had recommended an increase in the page-limit for petitions in capital cases, from 60 pages to the current 80 pages, concurrent with a required increase in font size. Notwithstanding this recent increase, members believed that 80 pages was still inadequate, and concurred that petitions are often twice that length. Members noted that if issues are not raised in a state court petition, they might be procedurally defaulted in federal court, and it is of utmost importance that state court counsel preserve these issues in the petition. What might be a marginal claim now might become significant in the future, and the petition should include such claims. Mitigation issues can consume many pages. Moreover, after counsel files a petition, the court might not set an evidentiary hearing, so the petition needs to be a comprehensive and exhaustive record. One member contended that counsel should not be compelled to sacrifice arguments simply to meet page limits. Prosecutor and defense members agreed that 80 pages was inadequate for petitions and responses in capital cases. On the other hand, judges routinely expect counsel to submit over-limit petitions along with motions to exceed the limits. Members concurred that there was no "magic number" as a page limit for capital petitions, and that regardless of what the rule specified, counsel would, if necessary, move to exceed it. The current rule says, "not to exceed 80 pages." Members considered adding a "safety valve" by expressly indicating that parties could move to extend the limits. Instead, however, and by a vote of 10 in favor and 5 opposed, they agreed to change Rule 32.7's limit for capital case petitions to "not to exceed 160 pages."

Rules 32.8 and 33.8 ("transcript preparation"): Members had no changes.

Rules 32.9 and 33.9 ("response and reply; amendments"): In accordance with the change in Rule 32.7 regarding the page limit of a capital case petition, members modified Rule 32.9(c) ("length of response and reply") to increase the limit of the State's response to a petition in a capital case from 80 pages to "not to exceed 160 pages," and to increase the defendant's reply from 40 pages to "not to exceed 80 pages."

Rules 32.10 and 33.10 ("assignment of a judge"): The November 9 drafts of these rules include provisions for a Rule 10.1 and Rule 10.2 change of judge, and for allowing the assigned PCR judge to hear and decide disputes concerning access to public records requested for a PCR proceeding. Members had no changes to these rules.

Rules 32.11 and 33.11 ("court review of the petition, response, and reply; further proceedings"): Members had no changes to these rules. Both rules include a section permitting the court to order a competency evaluation of the defendant, if necessary for presentation of a claim.

Rule 32.12 and 33.12 ("informal conference"): Rule 32.12(b) includes a provision applicable only to capital cases, which is omitted from Rule 33.12. Members had no changes to these rules.

Rules 32.13 and 33.13 ("evidentiary hearing"): Members had no changes to these rules. One member mentioned that parties require about 30 days to obtain a writ for transporting an incarcerated defendant to the courthouse and expressed concern regarding the 15-day notice provision in section (a); however, that notice provision applies only when the hearing is held at the defendant's place of confinement.

Rules 32.14 and 33.14 ("motion for rehearing"): Members had no changes to these rules.

Rules 32.15 and 33.15 (notification to the appellate court"): The November 9 drafts had identical provisions, but members changed both. Rule 32.15 was changed by reverting to a previous version, which requires the defense to notify the appellate court of any trial court ruling granting or denying relief on a defendant's notice or petition for post-conviction relief, or any motion for rehearing. Rule 33.15 was changed by substituting the words "a petition for review" for "an appeal," and by requiring notice of relief "granted or denied" by the trial court.

Rules 32.16 and 33.16 ("petition and cross-petition for review"): Members revised section (a) ("time and place of filing"), subpart (1) ("petition") to allow for the filing of a petition for review not only based on the trial court's "final decision on a petition or a motion for rehearing," but also for "the dismissal of a notice."

In Rule 32.16 (c) ("form and contents of a petition or cross-petition for review"), members added a new sentence applicable to capital cases, because there is no corresponding provision in the current rule. The new sentence requires that a petition for review or a response to a petition for review in a capital case "must not exceed 12,000 words or 50 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings."

Rules 32.16(c)(2) and 33.16(c)(2) require the petition to include copies of the trial court's rulings. Members agreed to add cross-references in these rules concerning the court's summary

disposition of a PCR notice. The Chair directed staff to check the other cross-references in these provisions.

Rule 32.17 ("stay of execution of a death sentence on a successive petition"): Members observed that this provision corresponds to current Rule 32.4(g), and they had no changes.

Rule 32.18 ("review of an intellectual disability determination in capital cases"): This provision corresponds to current Rule 32.10. Members had no changes.

Rule 32.19 and Rule 33.17 ("extension of time; victim notice and service"): Members discussed the application of the statutory provision referred to in this rule, A.R.S. § 13-4234.01, as well as other statutes regarding victims' rights. They concluded that the reference in current Rule 32.11 to A.R.S. § 13-4234.01 applied only to capital cases, which are addressed in Rule 32, and that it had no application to non-capital cases. They accordingly deleted draft Rule 33.17.

Rules 32.20 and 33.18 ("post-conviction deoxyribonucleic acid testing"): Judge Cattani noted that the November 9 version eliminated the distinction between mandatory testing and discretionary testing because the distinction did not appear to be meaningful. Members had no opposition to that revision. A member observed that Rules 32 and 33 had parallel subject matter provisions up to and including Rules 32.16 and 33.16. The member proposed renumbering the DNA rules as Rules 32.17 and 33.17 to retain this symmetry, and renumbering Rules 32.17, 32.18, and 32.19, which apply to capital cases and have no analog in Rule 33, as Rules 32.18, 32.19, and 32.20. Members concurred with this proposal.

The section-by-section review demonstrated the duplication of a significant number of Rule 32 and Rule 33 provisions. The Chair inquired of the members once again if they would prefer to reduce the duplication by having two separate rules with differentiated provisions, and a third rule with provisions common to both pleading and non-pleading defendants. The members preferred the approach previously taken by the Task Force, i.e., having standalone Rules 32 and 33. See further the November 9 meeting minutes at pages 2-3, where the members formally approved the bifurcated rules concept.

3. <u>Rule petition and roadmap.</u> Today's materials packet contained a draft rule petition. Staff will revise the draft to include items discussed during today's meeting. The Chair advised that the petition would include final versions of Rules 32 and 33, and an explanation of changes to the current rule. The petition will not include redline versions because of the extent of the revisions. The Chair invited Ms. Gard to submit a summary of her position concerning Rule 32.1(h) for inclusion as an appendix to the petition. He requested Judge Viola and Mr. Steinfeld to review Rule 41, Forms 23, 24(b), and 25, and to prepare changes that will conform these forms to the final versions of Rules 32 and 33.

The Chair noted that he and staff and others working at his direction will need to proofread and correct items in the draft rules, petition, and appendices, including grammatical and syntactical editing and renumbering but not including substantive changes to the rules, and he asked the members for their authority to make these revisions.

Motion: A member moved to give the Chair the authority as specified above. The motion received a second and it passed unanimously. **R32TF: 006**

The Chair added that staff would endeavor to circulate the documents to the members prior to filing. He requested the members to review these documents before the filing deadline. The deadline for filing a rule petition is January 10, 2019.

The Chair reviewed the rule petition process. The Court will open the petition for public comments, which are due by May 1. Members will then reconvene to discuss the comments, and they will prepare a reply and further revisions to the proposed rules. The Chair with the members agreement set the next Task Force meeting for Friday, May 10, 2019. The Court will consider the petition, comments, and reply at its rules agenda at the end of August or beginning of September 2019. The customary effective date of new rules is January 1 of the following year.

4. **Call to the public.** There was no response to a call to the public.

5. **Adjourn.** The meeting adjourned at 4:40 p.m.