Rule 32 Task Force

State Courts Building, Phoenix

Meeting Minutes: March 23, 2018

Members attending: Hon. Joseph Welty (Chair), Hon. James Beene, Hon. Cathleen Brown Nichols, Hon. Kent Cattani, Hon. Peter Eckerstrom, David Euchner (by telephone), Jennifer Garcia, Hon. Kellie Johnson, Dan Levey, Michael Mitchell, Hon. Samuel Myers, David Rodriquez, Hon. James Sampanes, Mikel Steinfeld (by telephone), Lacey Stover Gard, Hon. Danielle Viola, Hon. Rick Williams

Absent: Timothy Agan, Jason Kreag

Guests: Chief Justice Scott Bales, George Papa, John P. Todd, Tim Geiger, Kathryn Andrews

Task Force Staff: Beth Beckmann, Mark Meltzer, Theresa Barrett, Sabrina Nash

1. Call to order; introductions; remarks from the Chief Justice. Judge Myers, acting on behalf of the Chair, called the first meeting of this Task Force to order at 10:04 a.m. Judge Myers asked members and guests to introduce themselves, and Judge Welty, who had been presiding over a court proceeding, arrived during those introductions. Judge Welty then invited the Chief Justice to address the Task Force.

The Chief Justice noted that a Task Force on the Arizona Rules of Criminal Procedure had recently recommended, and the Court had adopted, comprehensive stylistic amendments to the criminal rules. However, while that Task Force saw the desirability of substantive changes to Rule 32, it did not make those changes because doing so would significantly exceed the scope of restyling. Members were selected for this Task Force based on their experience in post-conviction proceedings. The Chief Justice encouraged members to consider ways to reduce delay in the post-conviction relief process, and to make the process less cumbersome and better able to identify meritorious cases. He concluded by thanking members for their service in this endeavor.

2. Introductory remarks by the Chair. The Chair thanked the Chief Justice for his remarks. He also expressed his appreciation to Ms. Beckmann and Mr. Euchner, who prepared memos before the meeting outlining a variety of issues and concerns regarding Rule 32.

The Chair then reviewed Administrative Order number 2018-07, which established the Task Force. The Order gives the Task Force a broad charge to "identify possible substantive changes that improve upon the objectives of Rule 32 and the post-conviction relief process." Although the Chair anticipated members would propose the best possible rule for the criminal justice system, he also expects members will seek input from colleagues and vet ideas with their respective organizations. The Chair envisions most of the rule drafting will be done by workgroups, and that should necessitate fewer Task Force meetings. The Order includes a goal that the Task Force submit a rule petition by January 10, 2019. Members' terms conclude on December 31, 2019, which will allow members to reconvene after filing the petition to review public comments and to modify their rule proposal as appropriate. The Court will consider the

final version of the Task Force's proposed amendments to Rule 32 at its rules agenda in the late summer of 2019.

The Chair then requested Ms. Beckmann to summarize the issues her memo raised.

3. **Ms. Beckmann's memo.** Ms. Beckmann advised that she compiled her list of issues after speaking with other stakeholders. She added that her issues were not identified in order of importance, or presented in the sequence they appear in Rule 32.

Competence. The first issue was highlighted in a capital case, *Fitzgerald v. Myers*, 243 Ariz. 84, (2017), which held "that neither § 13-4041 nor Rule 32.5 requires a trial court to determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition." However, the Court added that a trial court may order a competency evaluation "if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, certain Rule 32 claims…." Judge Vasquez (sitting by designation) in an opinion that concurred in the result, disagreed with the majority's reasoning and "would hold that capital defendants have a right to competency in post-conviction proceedings for certain claims, such as IAC and other claims that do not appear from and cannot be presented with the existing record when those claims require a defendant's ability to effectively communicate with counsel. In my view, this is consistent with our statutes and rules, promotes justice, and causes no unnecessary delay." Ms. Beckmann noted that the defendant in this case had specifically waived a due process claim, and that both the majority and special concurrence were limited to the text of the rule.

Members then discussed whether the rule should accommodate the situation in which the defendant's lack of competency impedes counsel's ability to identify and develop a claim under Rule 32.1. One member thought a competence issue would arise only in a capital case, and that non-capital defendants would have no incentive to initiate potentially prolonged competence proceedings. Other members anticipated the issue would also arise in non-capital cases. Another member noted that the defendant's incompetence during a Rule 32 proceeding would not be disruptive if the defendant could be quickly restored, but long-term incompetence could be problematic if the petition raised substantive issues that required the defendant's testimony.

Members discussed additional issues. If the defendant was incompetent, how did facts come to light that formed a basis for the issues raised by the petition? Might there be sources other than the defendant's testimony that could prove supporting facts? If the defendant was incompetent, should the trial court stay the Rule 32 proceeding, and if so, could the stay become indefinite? What would happen if the defendant was not restored to competence? Would this concern also arise in non-capital of-right proceedings, and if so, might competence be a more acute issue in those proceedings? Might the rule include an exception to issues not raised in a previous proceeding due to defendant's incompetence?

Content of the notice. Rule 32.4(a)(3) provides: "The notice must contain the caption of the original criminal case or cases to which it pertains and the other information shown in Rule 41, Form 24(b)." Ms. Beckmann noted that in practice, there seems to be uncertainty about what the notice must include, particularly in the first, timely notice, which is often as bare bones as a notice of appeal. Must a first, timely notice identify specific claims? Because a first notice is

analogous to a notice of appeal, should the rule require, for the first and timely notice, only a statement that the notice is timely and not successive? What should the rule require for a successive or untimely proceeding? The current rule requires the notice to contain "other information shown in Rule 41, Form 24(b)." Would the rule be clearer if it specified those requirements?

Preclusion. Ms. Beckmann noted issues about the syntax of Rule 32.2(c), but more importantly, she addressed a substantive issue. The rule provides, "The State must plead and prove any ground of preclusion by a preponderance of the evidence. A court may determine that an issue is precluded even if the State does not raise preclusion." She believes that it is contradictory or superfluous to require the State to plead and prove preclusion, but regardless of whether the State satisfies that obligation, to then permit the court to find on its own that a claim is precluded. One member noted an expectation that both sides will fulfill their respective responsibilities under Rule 32, and said that this provision allowing the court to find preclusion, notwithstanding the State's failure to plead and prove it, is anomalous. However, a judge member asked the Task Force to consider how a federal court would deal with the procedural bar of preclusion if the State did not address it.

Ms. Beckmann raised another issue regarding preclusion in item 4 of her memo. Rule 32.2(b) provides that the general rule of preclusion in Rule 32.2(a) "does not apply to claims for relief based on Rules 32.1(d) through (h)." If a defendant raises a claim in a successive or untimely proceeding under Rule 32.1(d) through (h), the rule suggests that a defendant could procedurally raise a previously adjudicated claim. Rule 32.2(b) might be rational for claims of newly discovered evidence, for example, if new evidence is discovered that was not the basis of a previously litigated claim of newly discovered evidence. But it might not be reasonable for other types of claims if it permits relitigating claims that were finally adjudicated.

Ms. Beckmann also noted an issue under Rule 32.2(a)(3), which precludes a claim that was "waived at trial." She said that the issue most commonly arises for errors that occur at sentencing, and is compounded because the judgment becomes final once the court has rendered the sentence. To avoid the issue of waiver, is the defendant required to interrupt the court when it's rendering the sentence? She referred to *State v. Vermuele*, 226 Ariz. 399 (App. 2011), which rejected the State's argument that the defendant forfeited claims of sentencing error when the defendant failed to raise the issue in the trial court and had not argued on appeal that it was a fundamental error, because the defendant had "no clear procedural opportunity to challenge the rendition of sentence before it became final"

Time limit for filing a notice and petition. A.R.S. § 13-4234(G) provides that the time limits for filing a notice and the petition "are jurisdictional and an untimely filed notice or petition shall be dismissed with prejudice." But is this inaccurate regarding the petition, since the trial court under Rule 32.4(c) can grant multiple extensions to file a petition? The Chair noted that the issue is not whether the court can expand a time limit by granting extensions, but rather its inability to do so after the limit has passed. Other issues include whether there is a conflict between the statute and the rule, and whether the matter is strictly procedural and governed solely by court rule. The Chair requested members to make appropriate rule changes, and

determine thereafter whether there would be a need for statutory changes. One member suggested that when considering time limits established by rule, members should review revisions made by the Criminal Rules Task Force to Rules 12.9 and 24.1. A judge member reminded members of the general principle that the court should avoid conflicts with the other two branches when it can. The Chair may ask Professor Kreag for guidance on identifying procedural versus substantive issues under Rule 32.

Anders-type review. In *State v. Chavez*, 243 Ariz. 313 (App. 2017), Division One rejected the defendant's argument based on *Pacheco v Ryan*, CV-15-02264-PHX-DGC, 2016 WL 7407242 (D. Ariz. Dec. 22, 2016), that a defendant has a constitutional right to an *Anders*-type review in an of-right proceeding. Judge Cattani suggested in his special concurrence in *Chavez* that "there are compelling reasons for the Arizona Supreme Court to consider modifying the procedural rules to provide for a limited *Anders*-type review in Rule 32 of-right proceedings for pleading defendants that is similar to the review currently provided on appeal for non-pleading defendants." Members agreed that if they propose such a modification, it should be clear and specific. For example, would the court need to review transcripts of proceedings, or police reports? One member noted that the 5th Circuit provides an "*Anders* checklist" of required items. The checklist requires review of specific proceedings, such as change of plea and sentencing proceedings, as well as advisements to the defendant; and it requires that defense counsel provide a summary of those proceedings to confirm that counsel has reviewed them. A judge member added that an *Anders*-type process might mitigate the workload of appellate judges.

Illegal sentences. The next issue Ms. Beckmann raised was whether an illegal sentence should be an exception to the rule on preclusion. Can such a claim ever be precluded or untimely, and if it was not properly raised, could it give rise to a claim of ineffective assistance of counsel? Ms. Beckmann reported hearing recommendations that the rule be amended to create a means for defendants in these situations to obtain relief, particularly when the defendant pled guilty believing he or she was parole-eligible. However, she acknowledged that this might require a legislative solution, and such a bill is now progressing through the Legislature. The bill, SB 1211, is limited to plea agreement cases where the defendant entered a guilty plea believing he or she was parole eligible. But while limiting the bill's application to pleading defendants is rational because it goes to the validity of a plea, it might leave non-pleading defendants without a remedy for an illegal sentence. Claims of actual innocence are allowed under Rule 32.1, but they are not provided by statute. Might a similar ground be added under Rule 32.1 to provide relief in these circumstances, and if so, could such a claim be precludable or waivable?

Mata issues. A non-pleading defendant has no constitutional right to effective Rule 32 counsel, *State v. Mata*, 185 Ariz. 319 (1996), whereas the pleading defendant does, *State v. Petty*, 225 Ariz. 369 (App. 2010); *State v. Pruett*, 185 Ariz. 128 (App. 1995). Should the rule be amended to allow a non-pleading defendant, like a pleading defendant, to have a second opportunity to raise the ineffectiveness of Rule 32 counsel in a successive proceeding? This is particularly an issue when Rule 32 counsel either failed to raise a claim of ineffective assistance of trial counsel, or did so in an inefficient manner. Case law regards claims for ineffective assistance of counsel as constitutional, and requires defendants to bring all such claims in a Rule 32 proceeding. Yet for non-pleading defendants, there appears to be no recourse when counsel is ineffective in the

Rule 32 proceeding. An amendment to Rule 32 could acknowledge *Martinez v. Ryan*, 566 U.S. 1 (2012), and mitigate the tension between federal and state cases on whether a non-pleading defendant has a constitutional right to effective assistance of Rule 32 counsel. A judge-member acknowledged that tension, but also noted a policy favoring finality.

Diaz and Goldin issues. *State v. Diaz*, 236 Ariz. 361 (2014) recognized that a criminal defendant cannot obtain post-conviction relief on a ground that has been waived in a prior post-conviction relief proceeding. Nonetheless, the Court held that "under the unusual facts of this case," the defendant did not waive his ineffective assistance of trial counsel claim when, through no fault of the defendant, his counsel failed to file petitions in two prior post-conviction relief proceedings.

In *State v. Goldin*, 239 Ariz. 12 (App. 2015), Goldin asserted he had misunderstood his sentence because of the ineffectiveness of his attorneys. He explained he had failed to raise the IAC claim in a timely or previous proceeding because he had only recently learned he had such a claim. He then argued he was entitled to relief based on newly discovered evidence as both an independent claim and interrelated with his newly discovered IAC claim. Goldin contended in his reply, "Whether Defendant's claim is based on IAC, or newly-discovered evidence, there are those exceptional cases which deserve post-conviction consideration, even if the defendant failed to raise IAC in his first Rule 32 Notice." Like the Court in *Diaz,* and based on the unusual circumstances of the case, Division Two could not find that the Goldin waived the IAC claim. The case was returned to the trial court to consider, as a timely-raised claim, whether Goldin was entitled to relief.

Ms. Beckmann noted that these cases qualify the concepts of finality and preclusion. Circumstances such as those presented in these cases invariably arise. The Chair suggested a distinction between discovery of new evidence and discovery of a new claim. Some members expressed opposition to a rule amendment that would permit a new claim based on newly discovered ineffective assistance of counsel because it would create a significant exception to the principle of finality. These members believed that although the exception might apply in a few cases, it probably would be raised in many more cases. But another member thought that Rule 32 should not incentivize defendants to file ineffective assistance of counsel claims within 90 days as a matter of course, but rather the rule should be flexible enough to allow filing when there is really an issue to litigate.

Whitman issue. *State v. Whitman*, 234 Ariz. 565 (2014) clarified that the time for filing a notice of appeal ran from the oral pronouncement of sentence, rather than when the judgment of sentence was filed, and Rule 31.2(a) was amended accordingly. To make Rule 32's provision consistent with Rule 31 and with *Whitman*, the Task Force should consider making similar clarifications to Rule 32.4(a).

Notifying the appellate court when an appeal is suspended. Rule 31.3(b) permits suspension of an appeal to allow the trial court to decide a Rule 24 or 32 issue. The provision also requires an appellant to notify the appellate court when the trial court has decided the issue. Does the rule require additional clarification about the timing, manner, and content of the notice?

Rule 32.9 extensions to file a petition for review. Criminal Rule 31.3(e) authorizes the appellate court to modify a deadline concerning an appeal, and Rule 32.9(c)(1)(D) incorporates that provision by reference. But somewhat inconsistently, Rule 32.9(c)(3) requires a motion to extend time for filing a petition for review to be filed in and decided by the trial court. The Task Force should consider harmonizing these provisions.

4. **Mr. Euchner's memo.** The Chair then asked Mr. Euchner to summarize his memo. Mr. Euchner noted that Ms. Beckmann fully or partially addressed many of the items in his memo. But before proceeding to his other items, Mr. Euchner made a few general requests regarding drafting. First, he asked that members not use the same term if it has more than one meaning in different contexts. Conversely, he asked that they not use different terms that have the same meaning. Finally, he asked that rules provide clear guidance, for example, that something "probably" would have changed a result, rather than "might have" changed it.

Privilege and confidentiality. Mr. Euchner suggested adding a provision, perhaps in Rule 32.4, reciting that the filing of a notice waives privilege and confidentiality issues and allows predecessor counsel to communicate on otherwise privileged matters with successor counsel.

Subject matter jurisdiction. Mr. Euchner suggested that the rule on preclusion should exclude a lack of subject matter jurisdiction, and that a defendant should be able to raise at any time an issue that the court had no power to act.

Discovery. Citing an issue in *Canion v. Cole,* 210 Ariz. 598 (2005), Mr. Euchner recommended that Rule 32 address discovery, including a standard, e.g., substantial need, for the trial court to allow discovery. During the ensuing discussion, members agreed that if a portion of defense counsel's file is unavailable, prosecutors customarily attempt to provide the omitted materials to defendant. But sometimes, materials are lost and neither side has access to them. Another member noted that defendants might make public records requests during Rule 32 proceedings, especially in capital cases; but if the request is disputed, a civil judge, not the Rule 32 judge, is empowered to resolve the dispute. The member would like a Rule 32 amendment that authorizes the Rule 32 judge to hear the issue.

Change of judge. Mr. Euchner noted that when a Rule 32 proceeding can no longer be assigned to the original judge, e.g., because of the judge's retirement, counties have different local practices for reassigning the case. Mr. Euchner proposed that this should be standardized by a Rule 32 amendment. In addition, if the case is assigned to a new judge, and the defendant has never exercised a Rule 10.2 notice, Mr. Euchner requested that a Rule 32 amendment should specify that the defendant is entitled to a peremptory change of judge.

Separate rule set for post-conviction proceedings. Mr. Euchner also proposed a freestanding set of rules for criminal appeals and post-conviction proceedings, analogous to the Arizona Rules of Civil Appellate Procedure. Considering that civil appeals are governed by a distinct set of rules, he believes that post-conviction rules in criminal cases also should be separate from the trial court rules.

5. **Additional comments.** The Chair then asked members for additional suggestions, and members offered the following comments.

Rule 32.1. The Task Force should consider better nomenclature for an "of-right" petition, a term that many stakeholders find unclear and confusing. The Task Force might also consider separate rules or sections that govern post-conviction proceedings for defendants who have entered a plea, and for defendants who were found guilty at trial.

Rule 32.1(h). A pending capital case, *State v. Miles* (CR-16-0021-PC), raises an issue about the application of Rule 32.1(h). The Task Force should be alert for a decision in this case.

Rule 32.4(c). Rule 32.4(c) requires a defendant in a capital case to file a petition within 12 months after filing a first notice. The rule permits the court to grant one 60-day extension and 30-day extensions thereafter, but requires the defendant to file a status report with the Supreme Court every 60 days until the petition is filed. This member suggested that the rule should allow the trial court to grant longer extensions. For example, if defendant needs five months to obtain an expert's report, defense counsel should request an extension for that time and not be required to file multiple interim requests. Additionally, the requirement of a status report may be an unnecessary burden on defense counsel, and might have minimal benefit to the Supreme Court.

Rule 6.8. A member proposed an amendment to Rule 6.8 that would require the automatic assignment of two attorneys to a capital post-conviction proceeding. A second attorney is currently assigned only on a showing of need.

6. **Workgroups and future meeting dates.** The Chair observed that today's discussion should provide a solid foundation for moving forward. He reminded members that the initial drafting of rule amendments would be done by workgroups. After discussion, the Chair agreed to compose workgroups that were geographically diverse. The Chair further advised that there will be three workgroups, with six members and a lead point-of-contact for each. He will assign issues to the workgroups, and each workgroup should be prepared to present proposed amendments at the next Task Force meeting. The Chair also requested members to note proposed rule amendments that might be inconsistent with corresponding statutes, and which might require statutory amendments.

A date for the second meeting was not set, but the Chair will discuss this further with staff and notify members of the date. The assignment of members to workgroups, and the matters assigned to each workgroup, also will be forthcoming.

7. **Call to the public.** Mr. George Papa responded to a call to the public and expressed his concern that a post-conviction proceeding is assigned to the original judge rather than to a new judge.

8. **Adjourn.** The meeting adjourned at 1:40 p.m.