Rule 32 Task Force

State Courts Building, Phoenix

Meeting Minutes: August 3, 2018

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

Absent: Timothy Agan

Guests: Donna Hallam, George Papa, John P. Todd, Tim Geiger, Kathryn Andrews

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

1. **Call to order; introductory remarks; approval of meeting minutes.** The Chair called the second Task Force meeting to order at 10:05 a.m. He introduced the proxies and thanked members for their efforts during workgroup sessions.

After the first Task Force meeting, the Chair designated 18 issues for the workgroups to study. However, the Chair emphasized that this was only an initial compilation of issues. He requested members to bring to his or staff's attention any additional issues they find regarding Rule 32, and he will assign each of those new issues to one of the workgroups. The Chair reminded members to use the SharePoint version of Rule 32 when they prepare revisions for presentation to the Task Force. This will facilitate document sharing and version control. He observed that Administrative Order No. 2018-07, which established this Task Force, sets December 31, 2019 as the termination date for the members' terms. This will allow members to meet throughout 2019 to consider comments to their rule petition, which will be filed with the Supreme Court in January 2019.

The Chair then asked members to review draft minutes of the March 23, 2018 Task Force meeting. There were no corrections to the draft and a member made the following motion:

> **Motion:** To approve the March 23, 2018 meeting minutes. The motion received a second and carried unanimously. **R32TF-001**

The Chair advised that the Task Force would start its review today beginning at Rule 32.1, and then proceed through the rules sequentially.

2. Rule 32.1.

Of-right terminology. Judge Johnson opened the discussion by noting Workgroup 3 questioned the clarity of the term "of right petition" and discussed whether to abandon that

terminology. Members thought "of right" was misleading, or at least uninformative, and that "pleading defendant" and "non-pleading defendant" were awkward terms. However, members concurred that even though the term "of right" was misleading, it is imbedded in Arizona case law, and it provides a shorthand way of referring to an initial post-conviction petition by a defendant who pled guilty. Moreover, neither the workgroup nor Task Force members could devise a better term than "of right." The Chair requested members to research what terms other states are using and determine by the next meeting whether there is a better alternative.

Rule 32.1(f). Members then discussed issues under Rule 32.1(f). Workgroup 3 stylistically preferred "failure to timely file a notice" to the current "failure to file a notice within the required time." This led to a broader discussion about whether it was necessary to include the words "of right" in Rule 32.1(f), as the workgroup initially proposed, or whether the principles of Rule 32.1(f) could be restated without using that term. Ms. Beckmann suggested that members revise Rule 32.1(f) to provide relief to any defendant filing a successive petition when the failure to timely file the petition was not the defendant's fault. Some members expressed concern that incarcerated defendants may not get timely notice of court deadlines, for example, when appellate counsel fails to timely notify a client that an appeal was concluded and the time to file a PCR petition had begun to run, or when an inmate had been transferred within the Department of Corrections and legal mail had not yet been forward to the new location.

A judge member observed that the essence of Rule 32.1(f) is the failure to meet a deadline, and a revised rule should express this succinctly. Members reviewed Rule 32.4(a)(2) ("notice of post-conviction relief") and they agreed to bifurcate the content of Rule 32.1(f). As revised, Rule 32.1(f) would provide relief only for an untimely notice of appeal, i.e., "the failure to timely file a notice of appeal was not the defendant's fault." Members coupled that revision with a new subpart 32.4(a)(2)(E) regarding an untimely PCR notice: "*Excusing an Untimely Notice.* The court may excuse an untimely notice of post-conviction relief if the failure to timely file a notice was not the defendant's fault." Members agreed that Rule 32.4 was a more appropriate location and that a self-represented defendant would more likely look in Rule 32.4 than in Rule 32.1(f) for a provision excusing an untimely PCR notice. Members concurred with these changes and with the deletion of the comment to Rule 32.1(f). One member noted that these changes will require revisions to Rule 32 forms, which the Task Force should address in the future.

Rule 32.1(g). A Supreme Court staff attorney asked whether the Criminal Rules Task Force's recent restyling of Rule 32.1(g) intended to make changes in the law automatically retroactive. Members of the Rule 32 Task Force who had also served on the Criminal Rules Task Force confirmed that the previous Task Force did not intend automatic retroactivity. But to clarify this intent, members agreed to change the phrasing of Rule 32.1(g) from "if applied" to "if applicable."

Rule 32.1(h). Judge Cattani and Ms. Gard proceeded to a discussion of Rule 32.1(h), and a clause in that rule that affords relief upon clear and convincing evidence that no reasonable fact-finder would have imposed the death penalty. They noted the Supreme Court's recently issued its opinion in *State v. Miles*, 243 Ariz. 511 (April 10, 2018). The primary issue on appeal was, "Can newly proffered mitigation ever constitute clear and convincing evidence under Rule 32.1(h) that

a sentencer would not have imposed the death penalty?" Footnote 6 of a concurring opinion noted the establishment of this Task Force on Rule 32 and said that "Rule 32.1(h) is a prime candidate for the Task Force's consideration."

Rule 32.1 has a corollary in A.R.S. § 13-4231, which defines the scope of post-conviction relief. The provision at issue in Rule 32.1(h) is not one of the specified statutory grounds, and Judge Cattani and Ms. Gard addressed the separation of powers issue. Beyond that, and as detailed in a memo Ms. Gard prepared, they discussed whether the current rule's standard— that the fact-finder would not have imposed the death penalty —is a vague standard that seems to require the PCR judge to get inside the mind of the original jury or judge, which they believe is a subjective and difficult, if not impossible, task. For these reasons, Ms. Gard proposed a two-pronged revision to section (h). Because the aggravation phase of a capital case relies on objective evidentiary findings, one prong would add to section (h) the phrase "no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752." The other prong would delete the words, "the death penalty would not have been imposed," which would remove death verdicts from the purview of section (h). During her presentation, Ms. Gard noted that she had reviewed the Court's rule petition files concerning Rule 32.1(h), and the files provided no indication about the origin of the penalty clause provision. She added that if her proposed revisions are adopted, capital defendants would still have avenues for relief on other grounds, such as newly discovered evidence or ineffective assistance of counsel. The Chair opened Ms. Gard's proposal for discussion.

Ms. Merrill commented that the proposed revisions did not just clarify the rule, as *Miles* requested, but substantively changed it, which she thought was unnecessary. She would rather see a revision that clarifies whether the standard for relief under Rule 32.1(h) is objective or subjective. She also observed that there have been few petitions requesting relief under Rule 32.1(h), and she did not anticipate a flood of new petitions seeking relief under that rule because of *Miles*. Ms. Skinner noted that *Miles* was an exceptional circumstance because that defendant did not have competent counsel until a late stage of his case, and Rule 32.1(h) became a useful avenue for seeking relief. Judge Eckerstrom commented that 20 or 30 years ago, the concept of mitigation was just evolving. It has become more developed over time, there are even ABA standards on the duties of defense counsel regarding mitigation, and now most mitigation is brought up, unlike *Miles*, at earlier stages of a capital case. He acknowledged, however, that powerful mitigation evidence occasionally arises later.

On the other hand, Judge Cattani responded that if a defendant such as Miles is going to obtain relief for newly discovered mitigation evidence, it should be on grounds of newly discovered evidence under Rule 32.1(e) or ineffective assistance of counsel, which falls under Rule 32.1(a). Judge Cattani also suggested that Task Force members consider victims' rights and finality, and not perpetuate a rule, Rule 32.1(h), on which there can be no preclusion. Another member commented on Ms. Gard's proposed revisions being substantive in nature by noting that the Court could appropriately adopt a procedural rule such as 32.1(h) that allows courts to preclude unwarranted executions. Members further discussed potential issues concerning separation of powers. Judge Eckerstrom commented that there are some hybrid areas that permit

involvement by two branches of government without disregarding separation of powers, and this might be one such area.

The Chair concluded the discussion of Rule 32.1(h) by inviting a memo from Ms. Merrill or from other Task Force members on what an appropriate standard should be under this provision along the lines of what was suggested by a concurring opinion in *Miles*. The Task Force could then decide whether to clarify the standard in the existing rule, or whether to rewrite the rule, as Ms. Gard proposed. He added that the Task Force's rule petition might submit both alternatives to the Court.

3. **Rule 32.3.**

Petitioner's competence. Judge Johnson advised that after considering *Fitzgerald v. Myers,* 243 Ariz. 84, (2017), her workgroup decided it would be appropriate to add a comment to Rule 32.3 that cited to that case. The comment would provide the trial court with guidance on addressing a defendant's competence during a post-conviction proceeding. Her workgroup declined, however, to make a substantive amendment to the body of the rule.

A member asked if the workgroup considered an amendment to Rule 11 ("incompetence and mental examinations") that would include a specific reference to post-conviction proceedings. Judge Johnson responded that it had, but it did not propose an amendment to that rule because that rule deals with trial proceedings. Members also discussed locating a provision concerning a petitioner's competence in Rules 32.4 or 32.5. One member favored a new rule to address the defendant's competence in a Rule 32 proceeding, rather than a comment, because the defendant cannot obtain a remedy based on language in a comment. A judge member noted that he sees a meaningful number of successive petitions by petitioners who appear to have mental health problems but added that some mental health claims might be precluded. Another judge member responded that incompetence might be a ground for not filing a timely notice. The Chair observed that *Fitzgerald* suggests it is possible to have a competence determination in a post-conviction proceeding, and if that's the case, there should be a rule that addresses this. If there's nothing in the rules, the inference is that competence cannot be addressed in a post-conviction proceeding. The Chair also observed that the comment proposed by Judge Johnson's workgroup does not relate to a rule provision; rather, it's a comment untethered to a rule. He proposed that text in a rule should fill this gap.

Members also discussed what would happen in a Rule 32 proceeding if a defendant was found incompetent. Members concurred that if the defendant was restorable, nothing would happen in the proceeding for a specified time pending the defendant's restoration. If a defendant was not restorable, the defendant could not meet the burden of proof and the petition would be denied. One member proposed a fixed time for a stay, possibly 12 or 21 months, if a defendant is found incompetent. Another member suggested that the trial court could proceed on issues raised by a Rule 32 petition that don't require defendant to be competent. However, if a rule includes these options, care should be taken to assure that unresolved issues are not subject to preclusion.

The Chair proposed the following alternatives: include a "mini-version" of Rule 11 within Rule 32; include a reference to Rule 11 in a Rule 32 provision; include guidance in a Rule 32 comment; or make no changes. On a straw poll, 8 of 14 members opposed the option of adding a rule provision. The workgroup's comment was a compromise for those who did not want to put the substance of a competence determination in Rule 32 but still wanted to provide some guidance for trial judges. On another straw vote, 11 of 16 members opposed adding a comment. The Chair reminded members that they can ask for reconsideration if they have another proposal for addressing *Fitzgerald.*

4. Rule 32.4.

Whitman issue. Workgroup 2 dealt with an issuing arising under *State v Whitman*, 234 Ariz. 565 (2014). It did this by changing the words "entry of judgment and sentence" in current Rule 32.4(a)(2) to "oral pronouncement of sentence." Members concurred with this revision.

Notice to the appellate court. Ms. Beckmann noted that issues have arisen when there are concurrent appeals and Rule 32 proceedings in the trial court. She proposed an amendment to Rule 32.4(a)(4)(B) that would require the superior court clerk to send a copy of a final ruling in the PCR proceeding to the appropriate appellate court, as provided in Rule 32.9(c). Members concurred with her proposed amendment.

Appointment of co-counsel. Rule 32.4(b) addresses the appointment of counsel in capital post-conviction proceedings. Workgroup 3 reviewed American Bar Association materials and then discussed whether clarification of this rule was necessary to address the appointment of co-counsel. It determined that it was, but the workgroup also agreed that appointment of co-counsel should be discretionary rather than mandatory. It therefore proposed adding the following new sentence at the end of Rule 32.4(b)(1): "On application and if the trial court finds that such assistance is reasonably necessary, it may appoint co-counsel, and it may appoint an investigator, expert witnesses, and a mitigation specialist under Rule 6.7, at county expense." The proposed amendment would reflect current trial court practices. Members then discussed whether the appointment of co-counsel should be mandatory in a PCR proceeding (as indicated in the ABA materials), the burden of establishing a need for the request (it is a low burden), the timing of making the request (it should be in the early stage of a PCR), and the qualifications of PCR co-counsel (which are not addressed in Rule 6.8). Members preferred that the rule permit first chair counsel, rather than the court, to select co-counsel, because there may be issues in a case that require co-counsel with specialized knowledge, even if co-counsel is not qualified as trial counsel under Rule 6.8.

Smaller counties might not be able to afford a full defense team on a PCR, and by using the word "may" in Rule 32.4(b), the court could consider the county's financial resources before making appointments. On the other hand, if the defendant makes a showing that appointment of co-counsel is "reasonably necessary," the court might be required to make the appointment. Members resolved this dilemma by moving the workgroup's proposed language into a new subpart 32(b)(3), which would make the provision concerning the appointment of investigators, expert witnesses, and mitigation specialists applicable in both capital and non-capital cases. With

revisions, new subpart 32(b)(3) provides, "***Investigators, Expert Witnesses, and Mitigation Specialists.*** On application and if the trial court finds that such assistance is reasonably necessary, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7 at county expense." But upon a showing of reasonable necessity in a capital case, the court must appoint co-counsel under revised subpart 32(b)(1). Members agreed with these changes.

Anders-type review. Mr. Steinfeld presented an extensively revised Rule 32.4(d) to address the duties of defense counsel when they review post-conviction matters and find no colorable claims. His proposal includes a new form (not yet numbered) titled "Plea PCR Notice of Compliance Checklist." Mr. Steinfeld's proposed form and rule revisions represent his amalgamation of lists utilized in several federal circuits. Judge Cattani, who leads this workgroup, added that the proposed rule amendments and form were unanimously supported by the workgroup. Judge Cattani also mentioned that the Arizona Supreme Court did not accept a petition for review in *State v. Chavez*, which contains his special concurring opinion about the desirability of *Anders*-type review in post-conviction proceedings; Judge Cattani regards this declination as recognition that courts have no obligation to do an *Anders*-type review.

A defense attorney member acknowledged Judge Cattani's interpretation of the Court's order but stated that the denial of review in *Chavez* could also be interpreted as a signal to this Task Force to propose a rule amendment that addresses this topic. The member reported a variety of misfeasance of counsel on PCR appointments, such as not reading the file or filing inaccurate certifications. The member believes a better approach is not to require the court to do an *Anders*-type review, but rather, to fashion the rule so that counsel is required to perform the basic duties of a PCR investigation. Mr. Steinfeld noted that his proposed amendments and form outline those duties in a simple yet comprehensive manner. The proposed form would help assure that counsel has in fact looked at the court's record and corresponds with what an appellate court does on an *Anders* review. Members' comments followed.

One member asked what action the court should take if counsel submits an incomplete form. Members postulated that an attorney could indicate that some portions of the form were "n/a [not applicable]," or the court could return the matter to counsel to complete the form. Ms. Beckmann asked whether the workgroup intends the form to be used on successive petitions The Chair noted that a variety of issues won't be apparent on the record or reported on the form, such as what impelled the defendant to accept a plea offer. Judge Eckerstrom asked whether the form should be limited to of-right petitions, because an of-right petition is more analogous to a direct appeal. He suggested that it would not be feasible to impose an *Anders* review on trial judges in every post-conviction proceeding. He added that he did not believe Mr. Steinfeld's checklist was burdensome. Mr. Steinfeld responded to these comments by saying that the form is designed for the initial of-right petition. Neither the proposed rule nor the form prescribes what action counsel must take after reviewing the record; rather, they are designed simply to assure that counsel has reviewed the record. Counsel would not need to complete the form if counsel found a colorable issue and raising a single colorable issue might be less work than completing the form. A judge member also raised an issue concerning a provision in the proposed rule that requires counsel to identify potential claims. Mr. Steinfeld responded that he used the word "potential" for claims

that counsel declined to raise because the trial court probably made the correct ruling. Mr. Steinfeld explained that he wanted the form to be inclusive without causing friction between counsel and the defendant.

In summary, only one Task Force member believed that the court should be required to do an *Anders*-type review on post-conviction petitions. Otherwise, the Task Force agreed to recommend adoption of Mr. Steinfeld's proposed amendments and form, which places on counsel the responsibility to review the record. Members also agreed to adopt a proposed comment to Rule 32.4(d).

Privilege. Rule 32.4(f) is a new provision and addresses the issue of whether the attorney-client privilege extends to PCR counsel; or whether a waiver from the defendant is necessary for counsel to obtain the file, including privileged information within the file, from trial counsel. The rule clarifies that the privilege extends to PCR counsel, and that PCR counsel needs neither a waiver from the defendant nor a court order to access trial counsel's file. Members supported the proposed rule.

5. <u>Rule 32.6.</u>

Waiver of privilege. Members proceeded to an issue concerning waiver of the attorney-client privilege if the defendant raises an ineffective assistance of counsel claim in a post-conviction proceeding. Mr. Euchner presented a new Rule 32.6(a)(2), Workgroup 1's proposal for addressing this issue. The proposed provision allows the State to request a court order requiring the defendant to disclose material information if the petition requires inquiry into material or information that is covered by a privilege, such as ineffective assistance. One of the four subparts of this provision would require the court to hold a hearing to assure that the defendant knowingly waived the privilege. The second subpart provides that a subsequent order would be limited to material necessary to respond to the defendant's claim. A third subpart requires defendant's counsel to be present if the prosecutor interviews the defendant. A fourth subpart would require dismissal of a claim if the defendant refuses to waive the privilege and the refusal prevents the prosecutor from effectively responding to the claim.

Members disfavored the first subpart, which requires the court to hold a hearing and have a colloquy with the defendant to obtain a knowing waiver. This would present logistical issues and might impede the petition's progress. If the defendant is self-represented, it also could necessitate the appointment of advisory counsel. Several members suggested that a written waiver of the privilege should be sufficient. Mr. Euchner responded that the workgroup would revise the provision to delete the need for a hearing and to allow a written waiver, and the workgroup will present the rule again after that has been done.

6. <u>Rule 32.9.</u>

Notice to the appellate court (part 2). Proposed Rule 32.4(a)(4)(B), *supra*, requires the superior court clerk to send a copy of a final rule in the PCR proceeding to the appropriate appellate court, as provided in Rule 32.9(c). This companion provision repeats that requirement and requires defendant's counsel or a self-represented defendant to also inform the appellate

court of any trial court ruling granting or denying relief on a post-conviction notice or petition. Members had no objections to the new provision.

Extensions of time. Ms. Beckmann presented revisions to Rule 32.9(d)(1) concerning requests to extend the time for filing a petition or cross-petition for review, or for filing a delayed petition or cross-petition for review. The proposed rule has one subpart if the request is filed before the time has expired, and a second subpart for delayed filing, that is, when the time has expired but the court excuses it. Ms. Beckmann noted that if the trial court grants the request in either scenario, it will need to set a deadline for filing the petition or cross-petition (or the delayed petition or cross-petition). Members had no objection to this revised rule, but the Chair asked staff to assure that these provisions are parallel to provisions in Rule 31 for requesting extensions of time on petitions and cross-petitions for review in an appeal.

Appendix to a petition for review. Ms. Gard reviewed extensive changes to Rule 32.9(d)(4), which concerns an appendix to a petition or cross-petition for review. The current rule (Rule 32.9(c)(5)) distinguishes the appendix in capital and non-capital cases. Ms. Gard explained that the distinction arose because the trial court sent a paper record to the appellate court in non-capital cases, but not in capital cases, where the paper record was more voluminous. The record is now sent electronically in both types of cases, and Ms. Gard's revisions conform the rule to the current practice. Because the appellate court now has the complete record, an appendix would be optional in both capital and non-capital cases. Members had no changes to her proposed revisions.

7. <u>Other Rule 32 matters.</u>

Form comparisons. Mr. Steinfeld advised that he worked with Judge Viola to compare current Rule 41 Forms 24(b), 25, and 26 with the current rules to discern if there were any discrepancies. Rule 32 refers to the forms, and the forms rather than the rules provide the required content, so they found no discrepancies. They did, however, recommend a few modifications to the forms, as shown in the materials at pages 57-59 of today's meeting packet, such as adding after a series of checkboxes on the PCR notice that refer to specific rule subparts for relief.

Change of judge. Mr. Euchner noted that subpart (a)(4) of current Rule 10.2 ("Change of judge as a matter of right") provides, "A party is not entitled to a change of judge as a matter of right in a proceeding under Rule 32 or a remand for resentencing." Mr. Euchner, working with Workgroup 3, proposes to delete that provision. Current Rule 10(f) already provides that a change of judge is not available on a remand for resentencing, so the last 5 words of subpart (a)4) are redundant. Current Rule 10(e) provides that a party waives a change of judge of right if the party participates in any contested proceeding before that judge. The workgroup would add to that waiver provision the words "or sentencing" to clarify that appearing before the judge for sentencing operates as a waiver. With the deletion in section (a) and the addition in section (e), a party to a Rule 32 proceeding would have the same opportunity for a change of judge as a matter of right as the party would have in pretrial stages of the criminal process. Specifically, if a new judge is assigned to a Rule 32 matter because the original judge is unavailable, and if the party

has not previously used or waived the right, the party can exercise the challenge against the newly assigned judge.

The workgroup also proposed a comment to the revised rule. While discussing the comment, members considered whether a provision on a change of judge as a matter of right in a Rule 32 proceeding should remain associated with Rule 10.2, or whether Rule 32.4(f) ("assignment of a judge") would be a more suitable location. Judge Johnson advised that Workgroup 3 would study this further. The comment might be useful if the provision remains in Rule 10.2 but be less useful if it's moved to Rule 32.4.

8. **Call to the public.** Mr. George Papa responded to a call to the public. He reiterated the concern he expressed at the March Task Force meeting: that a post-conviction proceeding should not be assigned to the original judge, but that to enhance objectivity and avoid conflicting interests, it should instead be assigned to a new judge. Members discussed Mr. Papa's comment, but none saw any need to change the rules as he requested, and they took no action on his suggested change.

9. **Adjourn.** The Chair confirmed August 31, 2018, as the next Task Force meeting date. The meeting adjourned at 3:57 p.m.