Rule 32 Task Force

State Courts Building, Phoenix

Meeting Minutes: August 31, 2018

Members attending: Hon. Joseph Welty (Chair), Timothy Agan, Hon. James Beene, Hon. Kent Cattani, David Euchner, Jennifer Garcia, Hon. Kellie Johnson (by telephone), Jason Kreag, Dan Levey, Michael Mitchell, Hon. Samuel Myers, Hon. James Sampanes, Mikel Steinfeld, Lacey Stover Gard, Hon. Danielle Viola, Hon. Rick Williams

Absent: Hon. Cathleen Brown Nichols, Hon. Peter Eckerstrom, David Rodriquez

Guests: Ellie Hoecker, Tim Geiger, Kathryn Andrews

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

1. **Call to order; introductory remarks; approval of meeting minutes.** The Chair called the third Task Force meeting to order at 10:23 a.m. He commended the members' improvements to Rule 32 at the August 3 meeting, and he encouraged them to continue their efforts. He then directed the members' attention to the August 3 draft meeting minutes. Mr. Euchner requested a modification at page 6 of the draft. He requested to change a sentence that read, "On the other hand, a defense attorney member interpreted the denial of review in *Chavez* as a signal to this Task Force to propose an amendment that addresses this topic." He would change this to, "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 Chair advised that the minutes will be amended accordingly, and with that, a member made the following motion.

> **Motion:** To approve that August 3, 2018 minutes with Mr. Euchner's modification noted above. The motion received a second and it passed unanimously. **R32TF: 002**

The Chair then requested reports from the workgroups, beginning with Workgroup 3.

2. Workgroup 3. Judge Johnson and Judge Beene presented on behalf of the workgroup.

Change of judge of right. At the August 3 Task Force meeting, Workgroup 3 proposed an amendment to Rule 10.2 that would add a change of judge provision for post-conviction proceedings. After considering comments at that meeting, however, and to make Rule 32 more self-contained, the workgroup was now proposing to add the change of judge provision to Rule 32.4(g) ("assignment of a judge"). After members discussed the proposed draft, the Chair observed that to preserve the timing and other requirements for a change of judge, and to avoid repeating those requirements in Rule 32, it might be preferable to have Rule 32.4(g) cross-reference Rule 10.2. Because Rule 32.3(a) expressly provides that a Rule 32 proceeding "is part of the original criminal action," Judge Welty noted that post-conviction, a party would have the same right to a change of judge under Rule 10.2 as the party had prior to the entry of judgment. Most members agreed with the Chair's observation. After further discussion, members also agreed that the was no need for Rule 10.2(a)(4) to refer to remands for resentencing because the

remand is a continuation of the original case. Rule 10.2(e) will continue to refer to sentencing as a contested proceeding, even though it also may be uncontested. In summary, the members' revisions to Rule 32.4(g) during the meeting would simply provide that the provisions of Rules 10.1 and 10.2 apply to Rule 32 proceedings when the case is assigned to a new judge. The Chair will work with staff to assure deletion of inappropriate text in Rule 10.2.

Competence. During the August 3 Task Force meeting, members declined to add a rule or comment concerning the defendant's competence during a Rule 32 proceeding. However, the Chair invited further proposals to address this issue. Judge Johnson reported that the workgroup had no new proposal to present at today's meeting.

Of-right terminology. Judge Johnson also reported that the workgroup had no new language to substitute for the term "of right" in Rule 32.1. Judge Cattani, however, had a proposal for addressing the issue.

Judge Cattani proposed a new rule, conceptually numbered Rule 33, that would exclusively pertain to post-conviction proceedings for defendants who entered guilty pleas. He envisioned relocating current Rule 33 ("contempt") as either Rule 35 or Rule 36, both of which are currently "reserved." Judge Cattani reasoned that it would be easier for self-represented defendants to understand the process if all the provisions for post-conviction proceedings for pleading defendants were in a single rule, i.e., Rule 33. Furthermore, doing so would allow abrogation of the term "of right," which members and others have found vague and confusing.

Judge Cattani recognized that the creation of his proposed Rule 33 might duplicate many of the applicable provisions of Rule 32, but he believes the benefit of separate rules would outweigh the redundancy. A member inquired whether a defendant who pled guilty to some counts and was convicted on other counts following trial would file for post-conviction relief under Rule 32 or Rule 33. The response was that the defendant would proceed under Rule 32 for the counts on which the defendant was found guilty at trial, and under Rule 33 for the convictions following a plea. There would be straightforward and distinct procedures for each proceeding. Members favored the concept, and Judge Cattani will prepare and present a draft of his proposed revisions at the next meeting. Mr. Euchner requested that Judge Cattani also consider reorganizing the text of Rule 32.4 into more discreet segments; Mr. Euchner characterized the members' current draft, especially with the addition of the *Anders/Chavez* provisions, as a lengthy labyrinth of provisions.

3. **Workgroup 2.** After the August 3 Task Force meeting, Ms. Garcia, Ms. Merrill, Ms. Hoecker, and Mr. Euchner for the defense, and Ms. Gard on behalf of the State, submitted additional materials concerning the death sentence/*Miles* issue under Rule 32.1(h). Judge Cattani suggested that the Task Force's rule petition should present both positions. Judge Welty requested Ms. Garcia to briefly present the defense position. Ms. Garcia advised that the Arizona Supreme Court had three opportunities to consider the issue: first in the original rule petition, R-97-0006; then in a subsequent rule petition filed by the Arizona Attorney General, R-01-0015; and again in *State v. Miles*. On each occasion, the Court either supported the rule or retained its substance. Ms. Garcia noted further that Rule 32.1(h) has a high standard that is difficult to meet, and that on only a handful of occasions have defendants sought relief under the rule. She does

not see a separation of powers issue under the rule. (Mr. Euchner also mentioned a recent Supreme Court opinion, *Twin City Fire Insurance Co. v. Leija* (CV-17-0280 PR, 8/2/2018), in which Justice Bolick wrote a concurring opinion addressing separation of powers.) Ms. Gard responded to Ms. Garcia's comments by asking members not to read too much into *Miles* because the majority opinion in that case resolved the case on an issue other than the propriety of Rule 32.1(h). She also noted Justice Pelander's concurring opinion in *Miles* concerning the vague origin of the Rule 32.1(h) death penalty provision.

At this point Mr. Euchner moved that the Task Force not recommend a position concerning Rule 32.1(h), but rather, that the issue abide the Court's consideration of a future rule petition that he expected the Attorney General to file regarding Rule 32.1(h). The motion received a second, but another member requested to table the motion. One judge member thought taking no position wouldn't be helpful to the Court and asked why the Task Force should not give the Court the benefit of its opinion. Other members disagreed. One member thought the vote would be evenly split and therefore not compelling. Another member suggested that because the Rule 32.1(h) issue was divisive, taking a position on that provision could hinder the members' collaborative approach on other Rule 32 issues. But the Chair observed that Justice Pelander requested this Task Force to review the rule, and the Court is expecting the members' response. He added that although the petition could express the members' different views, the Task Force would be remiss if it did not include the majority's recommendation. Members unanimously agreed to table the motion pending Workgroup 2's further consideration of Rule 32.1(h).

4. **Workgroup 1.** Mr. Euchner presented on behalf of the workgroup.

Preclusion: burden of proof. Mr. Euchner noted that current Rule 32.3(c) ("standard of proof") contains two sentences that some stakeholders consider contradictory. To avoid confusion, the workgroup moved the second sentence ("at any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion") to Rule 32.3(b) ("exceptions"), with the added words "at any time" to allow the court to summarily dismiss precluded claims after the notice is filed or at a later time. The workgroup moved the first sentence of Rule 32.3(c) ("the State must plead and prove any ground of preclusion by a preponderance of the evidence") so it is now the last sentence of Rule 32.6(a) ("State's response"). Judge Cattani proposed eliminating this sentence because whether the State proves preclusion, or the court finds it on its own initiative, the claim is precluded if the evidence establishes preclusion. The workgroup will discuss this point further.

Discovery. Mr. Mitchell did not find a need to include a discovery provision in Rule 32 because he did not think discovery was a significant problem under the current rules — there currently is no discovery provision in Rule 32 —but he acknowledged this was a minority view in the workgroup. Mr. Euchner presented the workgroup's majority view, which was expressed in a proposed new Rule 32.4(h) titled "discovery." The proposed new rule diverges from the leading case, *Canion v. Cole*, which permitted discovery only after the filing of a petition. The workgroup's draft allows discovery earlier, after filing a notice, but only by court order and on a showing of good cause. The draft rule further provides that to show good cause, the moving

party "must identify the claim to which the discovery related and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim."

A judge member believed that the filing of a petition was necessary to provide context for a discovery request, and to sufficiently narrow the request so it did not become a fishing expedition. Another judge member stated his belief that pre-petition discovery would lead to delay in the filing of a petition. The judge believed the rule should follow the ruling in *Canion v. Cole*. But other members discussed why merely a notice should be sufficient to support a discovery request. These members believed that discovery could assist, or even be essential for, the preparation of a petition. They contended that pre-petition discovery helps to identify, and provide a basis for, issues raised in the petition. Additionally, allowing discovery before the petition might expedite the process by avoiding the need to continue a hearing on the petition because of ongoing post-petition discovery. Finally, the court may appoint experts after the notice is filed, but before the defendant files a petition, and pre-petition discovery could obtain information on which the expert could rely. However, if the court can authorize pre-petition discovery, the Chair suggested that Rule 32.4(h) include a more rigorous standard than "good cause;" he suggested "substantial need," which is a Rule 15 standard. The workgroup agreed to take another look at proposed Rule 32.4(h) and consider today's discussion.

Illegal sentences. Ms. Beckmann led the discussion on this issue. She began by noting the troublesome circumstance of a defendant whose sentence exceeds what the trial court intended to impose, or what was permitted by law, but who did not become aware of the discrepancy until the approach of an anticipated release date. Although the defendant might file a Rule 32 petition when becoming aware of the discrepancy, the petition might be dismissed on grounds of preclusion or untimeliness, leaving the defendant with no remedy. *Diaz*, *Goldin*, and *Gonzales* are examples of these cases. Invariably, the defendants in these circumstances must overcome the bars of untimeliness and preclusion.

Workgroup 1 contemplated a change to Rule 32.2(b) ("exceptions") so that claims of sentences "not authorized by law" under Rule 32.1(c) would not be subject to preclusion. On the one hand, the current number of meritorious section (c) claims is relatively small; and if a sentence is truly illegal, the interests of victims and the finality of judgments are not furthered by holding the defendant for longer than the correct sentence. On the other hand, some members believed that unless such claims are precluded, the proposed rule change could lead to large numbers of section (c) claims. Mr. Mitchell suggested that rather than removing section (c) from the effect of preclusion, the State can waive the defense of preclusion on a case-by-case basis and when necessary in the interests of justice. Mr. Euchner advised that the workgroup would study the issue further. Moreover, when it does so, the workgroup also will consider whether it deleted the correct clause of Rule 32.1(c). The workgroup's draft now says, "the sentence imposed ~~exceeds the maximum authorized by law, or~~ is ~~otherwise~~ not in accordance with the sentence authorized by law." Some members believed the stricken language should be retained, and the balance of the provision should be deleted, and the workgroup will reconsider this as well.

Lack of jurisdiction. Ms. Beckmann also presented a memo she prepared with Judge Nichols concerning jurisdiction under Rule 32.1(b). They reviewed pertinent case law and

concluded that the term "jurisdiction" is sometimes used loosely to include personal as well as subject matter jurisdiction. Ms. Beckmann cited the 2010 Supreme Court's opinion in *State v. Maldonado*, which noted that courts and parties had been using the term "jurisdiction" imprecisely and to refer to procedural defects that do not implicate a court's subject matter jurisdiction. Ms. Beckmann indicated that the term jurisdiction in Rule 32.1(b) was most likely intended to refer only to subject matter jurisdiction. The distinction between types of jurisdiction is significant because while personal jurisdiction can be waived, subject matter jurisdiction cannot be waived. Although defendants rarely raise true claims of lack of subject matter jurisdiction, the workgroup believed as a matter of policy that those claims should not be precluded, consistently with the principle that subject matter jurisdiction can be raised at any time. She cited *State v Espinoza*, a 2012 Division Two opinion that relied in part on *Maldonado*. The case presented an example of a procedural tangle that resulted from an initial lack of subject matter jurisdiction and a post-conviction claim long thereafter; had the claim been precluded, it might have never been corrected. The workgroup proposed an amendment to Rule 32.2(b) that would remove lack of jurisdiction from the effect of preclusion. However, the workgroup had concerns that if it exempted the entirety of Rule 32.1(b), it might inadvertently affect claims that should be precluded, i.e., a lack of personal jurisdiction, if that also was included in 32.1(b). A judge member requested an opportunity to further review applicable case law before the members decided on a course of action.

Preclusion: generally. Ms. Beckmann and Mr. Euchner then posed the following issue. Current Rule 32.2(b) exempts from the preclusive effect of Rule 32.2(a) claims that are made under Rule 32.1(d) through (h). Based on the discussion above concerning Rules 32.1(b) and 32.1(c), members might possibly expand the exemption to claims brought under Rules 32.1(b) through 32.1(h). In other words, the only claims that still would be subject to preclusion would be those brought under Rule 32.1(a). While most Rule 32 claims are brought under section (a), the exemptions to preclusion under Rule 32.2(b) would nonetheless overshadow the claims subject to preclusion under Rule 32.2(a). This could necessitate stylistic changes to Rule 32.2, but at the same time, any such changes also would need to accommodate A.R.S. § 13-4232.

Privilege. Mr. Euchner advised that following members' comments during the August 3 Task Force meeting, the workgroup scrapped its proposed amendments to Rule 32.6(a) concerning the defendant's waiver of the attorney-client privilege on an ineffective assistance of counsel claim. The earlier draft would have required an in-court colloquy between the judge and the defendant to obtain a waiver. However, in lieu of the former draft, Workgroup 1 now proposed an amendment to Rule 32.4(d) ("duty of counsel, defendant's pro se petition"). The words "waiver of attorney-client privilege" would be added to the title of Rule 32.4(d). The proposed amendment would provide, "By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4)." Members agreed with the provision but questioned whether Rule 32.4(d) was the most suitable location. Members then tentatively agreed to relocate the provision as a new, standalone Rule 32.4(f) with the revised title, "attorney-client privilege and confidentiality for the defendant." If members can find a more

appropriate location, they will move it again. They may also break the provision into two numbered subparts.

Transcripts. Judge Myers advised that Ms. Andrews had brought to his attention an issue involving missing transcripts. Rules 31.8(e) and 31.8(f) allow for reconstruction of the record when transcripts are missing on an appeal, but there is no corresponding provision in Rule 32. Ms. Andrews proposed adding a comparable provision in Rule 32.4(e) ("transcript preparation"). Members were in general agreement with her proposal, but because of the length of the Rule 31 provisions, they preferred to add cross-references to those provisions rather than duplicating them entirely in Rule 32.

5. **Roadmap.** The Chair again encouraged members to advise him or staff of any new areas in Rule 32 that the Task Force should study. The Task Force is finishing the initial 18 assigned topics, but members need to start working on any additional issues.

The Chair had contemplated a meeting on Friday, October 12, but several members would be absent then. Another date in October will be selected, but it might not be on a Friday.

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

7. **Adjourn.** The meeting adjourned at 1:54 p.m.