Rule 32 Task Force

State Courts Building, Phoenix

Meeting Minutes: November 9, 2018

Members attending: Hon. Joseph Welty (Chair), Timothy Agan, Hon. James Beene, Hon. Cathleen Brown Nichols (by telephone), Hon. Kent Cattani (by telephone), Hon. Peter Eckerstrom, David Euchner, Hon. Kellie Johnson, Jason Kreag, Michael Mitchell, Hon. Samuel Myers, David Rodriquez, Hon. James Sampanes, Mikel Steinfeld, Lacey Stover Gard

Absent: Jennifer Garcia, Dan Levey, Hon. Danielle Viola, Hon. Rick Williams

Guests: Tim Geiger, 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 fourth Task Force meeting to order at 11:52 a.m. He thanked the members for their flexibility regarding the starting time of today's meeting. He then asked members to review the August 31 draft meeting minutes. There were no corrections and a member made the following motion:

> **Motion:** To approve the August 31, 2018 minutes. The motion received a second and it passed unanimously. **R32TF: 003**

The Chair then requested a report from Workgroup 1, which met on September 25, a few weeks after the previous Task Force meeting.

2. Workgroup 1. Mr. Euchner began his presentation with a general observation that the "split" version of Rule 32 —i.e., separating the rules for post-conviction proceedings into a Rule 32 for proceedings after a trial, and a new Rule 33 for proceedings after a guilty plea — was "going down the wrong path." To discuss the workgroup's changes, Mr. Euchner preferred using the August 31 version of Rule 32, which was in the meeting materials, rather than the November 9 versions of Rules 32 and 33, which also were in the materials. Because some of the most recent revisions had been restyled and reorganized in the November 9 version, the Chair requested that Judge Cattani, the architect of the split version, explain what had changed.

3. Introduction to the split version. Judge Cattani said the objective of the split version was to direct defendants who had pled guilty to a self-contained rule they could more easily follow. He accomplished this by relocating from Rule 32 into a new Rule 33 the essential provisions concerning "of right" petitions. His primary intent was to avoid confusion between pleading and non-pleading defendants. By doing so, "of-right" terminology was eliminated from the rules on post-conviction proceedings. Defendants sentenced after a trial would continue to utilize Rule 32, but the revised Rule 32 would be free of what members previously acknowledged was the confusing of right terminology that's contained in current Rule 32. Put simply, Rule 32 and Rule 33 would provide the complete procedural tracks and

requirements, respectively, for defendants who are found guilty at trial and for defendants who enter a guilty or no contest plea.

The Chair noted that redundancy in these two rules was not ideal, but also thought the rules provided the benefit of clarity for judges as well as self-represented litigants. A prosecutor member had discussed the concept with colleagues, who agreed that because most defendants enter guilty pleas, the new Rule 33 makes good sense. Another prosecutor concurred. But Mr. Euchner explained the basis of his opposition. He thought the two new rules were too complex because they contained 38 parts, compared to 12 parts in current Rule 32. He envisioned difficulty doing legal research because case law would no longer align with referenced subparts. And he believed that inmates, who often lack access to up-to-date rule books, would be disadvantaged using the old books. He acknowledged that the recent Criminal Rules restyling resulted in a reorganized Rule 31 ("appeals") that includes 24 subparts but added that even those changes required relearning cross-references in the old version. He thought the increased number of subparts in Rules 32 and 33 would create immeasurable confusion, and that it would be harder to locate new provisions. He proposed an alternative in which Rules 31 and 32 would be in a new standalone set of post-judgment rules, much like the ARCAP for civil appeals.

Judge Cattani said that current Rule 32 almost immediately confounds pleading and non-pleading defendants. Rule 32.2 on preclusion refers to issues raiseable on direct appeal or adjudicated on the merits on an appeal, neither of which has application to pleading defendants because they have no right to appeal. Preclusion is a critical concept in post-conviction proceedings, and its applicability is not clear under the current rule. Another judge member thought the split rules were consistent with the directions of Administrative Order No, 2018-07, which established the Task Force. Although a defense attorney member found Mr. Euchner's alternative proposal meritorious, a defense attorney member also voiced support for Judge Cattani's split version because self-represented defendants would benefit from its increased clarity. However, this member noted that duplication in Rules 32 and 33 would require heightened diligence in proposing parallel rule amendments in the future. Another member asked what would happen when an appellate court interpreted a provision in one of the split rules without considering the parallel provision. Members thought counsel could rationally argue that the decision would apply to both, unless a provision was unique to pleading or non-pleading defendants, a circumstance that arises under current Rule 32. Members considered a proposal for two shorter rules that distinguished procedures for pleading and non-pleading defendants, and a third rule the included procedures common to both. This would reduce redundancy, but members did not support the proposal.

The Chair observed that the Task Force now had an opportunity to take bold action to fix and clarify a broken and confusing rule. He recognized that the split rules might create short-term challenges, but they would offer a better, clearer set of rules and a more efficient process in the long-term. He thought the Supreme Court would thoughtfully consider the split rules proposal. At this point, members voted on whether to proceed with the split set of rules.

Motion: To proceed with further drafting based on the Rule 32/Rule 33 concept. The motion received a second and passed with one member opposed. **R32TF: 004**

For future discussions, members requested a redline, compare, or side-by-side version that would show detailed changes the November 9 version made to the August 31 version. Staff noted that a 5-page document in the supplemental meeting packet titled "notes of significant changes" that highlighted these changes.

In response to follow-up questions, Judge Cattani noted two specific changes. First, in Rule 32.4 of the former version, Mr. Steinfeld's revisions required that a notice of no colorable claim identify a list of items (9 items in a petition from a change of plea, and 14 items in a petition from a trial.) The revised version required the notice to identify only the first 5 items, and to include an avowal that counsel had reviewed or considered the remaining items in the list. Mr. Steinfeld maintained that an avowal was insufficient to verify that counsel diligently performed a full review. Judge Cattani responded that if the notice becomes too complex, counsel will raise a single issue to avoid identifying the long list of items. Members concurred with a compromise that counsel "should identify" the items.

Judge Cattani also noted that revised Rule 32.15 and Rule 33.15 would require notification to the appellate court only if the trial court grants relief; unlike the prior version, notice would not be required when the trial court denies relief. Moreover, the burden of providing the notice under these revised rules shifts from the clerk to defense counsel. This shift relieves the clerk of a duty to review the trial court's ruling and attempting to determine if the trial court granted relief in a manner that would impact the pending appeal.

Judge Cattani was asked whether a capital defendant who pled guilty to first-degree murder before the start of trial, but who was subsequently sentenced to death by a jury in the penalty phase of trial, would proceed under Rule 32 or Rule 33. Judge Cattani noted that proposed Rule 32.3(c) would explicitly require that defendant to proceed under Rule 32 for all post-conviction relief. See further *State v Ovante*, 231 Ariz. 180 (2013). He added that this principle should be embedded in the next draft of this rule by making it applicable to non-capital cases. Judge Myers observed that Criminal Rule 17.7, which was a new rule that resulted from the restyling project, concerns "submitting a case on the record." He asked that this Task Force clarify in its draft whether a conviction under Rule 17.7 would be reviewable under Rule 32 or Rule 33.

Finally, members discussed an issue under Rule 33.1(e). The draft provides for newly discovered evidence that "probably would have changed the sentence." Could newly discovered evidence under this rule concern the validity of the plea? Members agreed that it might, and the rule should not be limited to new evidence regarding the sentence. Judge Cattani initially thought that Rule 33.1(h) would cover newly discovered evidence that might have affected the plea, but then agreed that the draft Rule 33.1(e) also should encompass that circumstance.

4. Rule 32.1(h). Members proceeded to revisit issues arising in capital cases under Rule 32.1(h) and articulated in *State v. Miles*. Members had previously considered separate memos prepared by Ms. Gard on behalf of the Attorney General and by the Federal Public Defender on behalf of the defense community. Today's meeting materials included two

additional memos, one prepared by Mr. Steinfeld and the other by Ms. Gard, each of which contained newly proposed language for Rule 32.1.

Mr. Steinfeld proposed the following modification to Rule 32.1(h):

> **(h)** the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt, or that no reasonable fact-finder would have imposed the death penalty ~~would not have been imposed~~.

Mr. Steinfeld noted that his proposal squarely addresses the Supreme Court's interest in an objective standard for this provision, as expressed in the *Miles* opinion.

Ms. Gard's proposed modifications would revise Rule 32.1(c) and (h) as follows:

> (c) a non-capital ~~the~~ sentence ~~imposed~~ exceeds the maximum authorized by law~~, or is otherwise not in accordance with the sentence authorized by law~~ or, in a capital case, the defendant presents clear and convincing evidence that no reasonable fact-finder would have found the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13–752;
> ….
> (h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt~~, or that the death penalty would not have been imposed~~.

Ms. Gard reiterated that it is unreasonable to use an objective standard for reviewing a mitigation decision in a death penalty case because mitigation is expressly subjective. Accordingly, her modifications would address eligibility for the death penalty, i.e., the aggravation phase, but would remove penalty phase decisions, which weight aggravating and mitigating factors, from the scope of Rule 32.1.

The Chair opened both proposals for member comments. One member said that Ms. Gard's proposal deviated from the Court's request in *Miles* for the Task Force to address the standard because her proposal instead dealt with eligibility. A judge member noted that many federal court remands of Arizona capital cases involved reconsideration of mitigation and thought that Mr. Steinfeld's proposal was a better way for Arizona courts to review those claims. Members generally agreed that neither proposal would further finality because there will undoubtedly be further federal court review of mitigation issues. For that reason, one member favored Ms. Gard's proposal because federal courts will apply their own mitigation jurisprudence regardless. Members also discussed whether modifying Rule 32.1(h) would be a substantive change in derogation of A.R.S. § 13-4231 and separation of powers principles. Citing *Seisinger v Siebel* (Ariz. 2009), a judge member noted that the Arizona Supreme Court adopted Rule 32.1(h) almost two decades ago, yet the Legislature took no action in response during that interval, thereby allowing the judiciary to occupy that space. Another judge member believes Rule 32.1(h)

is entirely substantive because it provides a right not found in statute. One member noted that a Rule 32.1(h) issue is rarely raised in a capital case, yet it is a matter of special concern to the Attorney General. Rather than having the Task Force resolve this issue, the member proposed that the Attorney General should independently file a rule petition.

At that point, the Chair presented three matters to the members, with the third matter being dispositive:

(1) Should the Task Force advance Mr. Steinfeld's proposed modification? 9 members favored doing so, 5 did not.
(2) Should the Task Force advance Ms. Gard's recently proposed modifications? 7 members favored doing so, 7 did not. The Chair favored doing so and therefore broke the tie.
(3) Which modifications, Mr. Steinfeld's or Ms. Gard's, should the Task Force recommend in its rule petition?

Vote on the third matter: 7 members favored Mr. Steinfeld's proposed modification, 6 favored Ms. Gard's, and there was one abstention (Judge Sampanes).

The Task Force accordingly will recommend modifying Rule 32.1(h) in the manner proposed by Mr. Steinfeld.

5. Illegal sentences. Judge Eckerstrom and Ms. Beckmann prepared a memo for the members' consideration titled, "Identifying Parameters of Illegal Sentence Under Rule 32.1(c) in Evaluating Whether to Except Such Claims [Under] Rule 32.2 and Time Limits of Rule 32.4." They concluded that if an inmate is confined on an unlawful sentence, there is no societal interest in continuing to hold that inmate and the inmate's claim for relief under Rule 32.1(c) should not be precluded. These claims are often untimely — and subject to automatic preclusion under current Rule 32.2 — because the inmate might not check a release computation until the release date nears and might not realize until then that his or her confinement might exceed what the law allows. Judge Eckerstrom prefers that these claims not be precluded if the inmate has a legitimate reason for not raising it previously. He believes the language in the current draft of Rule 32.1(c) ("the sentence imposed exceeds the maximum authorized by law") is appropriate, but he is concerned that this might open the door for other claims — for example, the judge did not give the sentence the inmate wanted, or thought was deserved — that should rightly be precluded. The drafting challenge is distinguishing claims under Rule 32.1(c) that should be heard on the merits without an awkward end-run around preclusion, from many claims that are truly frivolous and should be precluded under Rule 32.2. Judge Eckerstrom proposed a comment to clarify the intent of Rule 32.1(c), which is to provide a remedy for sentences that are unlawful as a matter of law. One member noted that inmates will file claims even when they are precluded, but if certain categories of claims (Rule 32.1(b), (c), and (d)) are no longer subject to preclusion, inmates might attempt to fashion a precludable section (a) claim into a non-precludable claim under one of the other sections.

Staff noted that the Rule 32.1(c) language of the split version ("the sentence imposed exceeds the maximum authorized by law") differs from the language in the prior version ("the sentence imposed is not in accordance with the sentence authorized by law.") Staff referred to the fourth page of the August 31 meeting minutes where members discussed this rule, and their concern at that time that previously stricken language ("exceeds the maximum authorized by law") should have been retained, and the retained language ("not in accord with the sentence authorized by law") should have been deleted. At its subsequent September meeting, Workgroup 1 agreed with the concern, and reversed what was stricken and what was retained. The phrase "exceeds the maximum authorized by law" was therefore included in the subsequent split draft.

Members continued to discuss the drafting issues and used as an example a plea agreement and sentence that required a defendant to serve 85% of the specified sentence, which was thereafter recomputed by the Department of Corrections to require service of 100% of the sentence. Would either phrase in Rule 32.1(c) apply to this circumstance? Members also discussed whether "probation," including a probation tail after a period of incarceration, would constitute a sentence under section (c), or whether courts would consider probation a suspension of the imposition of a sentence. To address these and related issues, members considered adding a comment to Rule 32.1, revising the preclusion language of Rule 32.2, or adding a comment to Rule 32.2. A judge member proposed a remedy under Rule 32.1(c) for a defendant whose sentence exceeded the maximum allowed by law, or whose sentence exceeded what was announced or imposed by the sentencing court. Members did not reach consensus on any of these proposed solutions, but they agreed that sentencing errors should not be subject to preclusion and to work on correct phrasing that incorporates this principle.

6. **Roadmap.** The Chair noted the need for another Task Force meeting and proposed a date of Tuesday, December 4, 2018. It appeared that a quorum would be available on that date and staff will notice the meeting. The meeting will begin at 10:00 a.m. The following are among the areas that members will need to address at the next meeting:

- Further refinements to Judge Cattani's split draft of Rules 32 and 33;
- Resolution of the language for illegal sentences, as noted in section (5) of these minutes;
- Issues concerning the timeliness of a post-conviction notice;
- A proposal by John Miles concerning page limits.

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

8. **Adjourn.** The meeting adjourned at 4:03 p.m.