M E M O R A N D U M

To: Rule 32 Task Force
Re: Identifying Parameters of Illegal Sentence Under Rule 32.1(c) in Evaluating Whether to Except Such Claims Rule 32.2 and Time Limits of Rule 32.4.
From: Hon. Peter Eckerstrom, Work Group 1
Beth Beckmann, Staff

Work Group I (WG1) has proposed to the Task Force that illegal sentences under Rule 32.1(c) should not be subject to automatic preclusion under Rule 32.2, or timeline requirements, provided in Rule 32.4(a)(2). Instead, they should be added to the list of claims as to which the court may reach the merits upon a petitioner's showing of good reason to have failed to file the claim earlier. As the WG members have stated at meetings and in prior memoranda, allowing a truly illegal sentence to avoid challenge because raised in an untimely or successive proceeding, simply does not make sense, nor does it "serve[] [an] important societal interest[]" to compel a defendant to serve an overly harsh sentence that is contrary to the law. *See State v. Shrum*, 220 Ariz. 115, ¶ 13 (2009) ("general rule of preclusion serves important societal interests" and "recognizes few exceptions"). A trial judge member of WG1 described the real-world difficulty of the scenario where a defendant/inmate has just learned his or her sentence is illegal (this frequently occurs when they receive an unexpectedly remote release date calculation from DOC), and brings it to the court's attention in an untimely or successive proceeding.

Although most of the members of the Task Force seem to agree with the proposal, there are concerns about whether the rule sufficiently narrows the species of claims to justify the change. Rule 32.1(c) states: "the sentence imposed exceeds the

maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law." In my view, this definition sufficiently proscribes the kinds of claims that may be raised, limiting them to the sentence that is illegal or has been imposed in an unlawful matter and, therefore, excludes challenges as to the constitutionality of a sentence (such as Eighth or Fourteenth Amendment violations) or claims that a sentence that is within the statutory parameters is excessive because the trial court erred in its discretionary balancing of sentencing factors. The latter claims must be raised under Rule 32.1(a): the defendant's conviction was obtained or the sentence was imposed in violation of the United States or Arizona constitutions.

Based on the language of Rule 32.1(c) and Arizona jurisprudence thereunder, I do not believe the rule change would open the proverbial floodgates for claims raised in untimely or successive proceedings. In any event, it is for trial courts to determine the true nature of the claim, as it must with any claim, and to reject one that is not truly cognizable under Rule 32.1(c). To the extent the Task Force remains concerned after considering the case law summarized below, then perhaps this would be one of those exceptional circumstances that would call for a comment.

SUMMARY OF CASES

State v. Shrum, 220 Ariz. 115 (2009). This case addressed what constitutes "a significant change in the law" for purposes of Rule 32.1(g), excepted from the preclusive effect of Rule 32.2(b). But that claim arose out of a sentencing challenge in the defendant's second PCR proceeding; he argued one of the counts to which he had pled

was improperly characterized as a dangerous crime against children and he should not have been sentenced under the more severe sentencing statute for DCAC offenses. To avoid preclusion of the sentencing claim, he characterized it as a change in the law claim under 32.1(g) based on a case in which the court had held DCAC enhancement was not permitted for attempted sexual conduct with a minor under the age of 12. The supreme court concluded the case was not a significant change in the law, therefore, the claim was precluded. This case illustrates the problem our proposed amendment would remedy. Notwithstanding that the defendant received an illegally harsh sentence under then prevailing law, the defendant was forced to mischaracterize his claim to avoid automatic preclusion. As a result, he must serve a sentence illegal under Arizona law with no remedy.

State v. Peek, 219 Ariz. 182 (2008). In this case, the supreme court addressed an illegal-sentence claim even though the claim was untimely because the state had waived preclusion and, the court found, courts have discretion whether to apply the rule of preclusion. In 2003, the defendant pled guilty to two counts of attempted child molestation and pursuant to the plea agreement, he was sentenced to a ten-year prison term followed by lifetime probation. He sought post-conviction relief in 2006, arguing lifetime probation was an illegal sentence because it was not authorized by statutes applicable at the time of the offenses, 1994 and 1996. After the court of appeals denied relief, the supreme court granted review to address the claim on the merits. The court noted the claim was untimely and should have been raised in his "of-right" proceeding,

but addressed it because the state joined the defendant in requesting that the court accept review to answer the legal question presented. The court stated, "Because the State has waived preclusion and this case presents a recurring legal issue of statewide importance on which trial courts have rendered conflicting opinions, we will address the merits of the petition." For our purposes, the case illustrates the kind of claim that falls within 32.1(c) and recognizes that, but for the state's waiver of preclusion and the court's exercise of its discretion not to find the claim waived, it would have been precluded.

State v. Cazares, 205 Ariz. 425, ¶ 4 (App. 2003). In this case, the court of appeals found the claim that the trial court had failed to impose the sentence in accordance with the law by failing to consider a statutory mitigating circumstance -- the defendant's age of 18 – a cognizable under Rule 32.1(c). The defendant pled guilty to aggravated assault and was sentenced to a partially aggravated, five-year prison term. The trial court found the claim was not cognizable under Rule 32 but denied relief on the merits in any event. On review, the court of appeals reasoned that article 2, § 24 of the Arizona Constitution provides that an accused in a criminal prosecution has the "right to appeal in all cases," which, pursuant to A.R.S. § 13-4033(A)(3), includes the right to appeal a "sentence on the grounds that it is illegal or excessive." The court stated that the claim was like the claim in *State v. Harrison*, 195 Ariz. 28 (App. 1998), *aff'd*, 195 Ariz. 1 (1999), in which the sentence was vacated and the case remanded for resentencing because the sentence had been imposed in an unlawful manner; the trial court had failed to comply with the statutory requirements in imposing an aggravated prison term of setting forth

on the record the aggravating circumstances it found existed, and articulating its finding as to each factor. The court reasoned the sentencing process followed in *Harrison* "would not necessarily have been insulated from review if the defendant in that case had pled guilty instead of going to trial," simply because a pleading defendant waives the right to a direct appeal. Rather, the pleading defendant still has the right to be sentenced according to the law. The court stated: "Rule 32.1(c) permits post-conviction relief when the sentence imposed is 'not in accordance with the sentence authorized by law.' We conclude that this provision of Rule 32 encompasses a claim that a sentence was not imposed in compliance with the relevant sentencing law." In imposing the aggravated sentence, the trial court articulated numerous aggravating circumstances, including the defendant's criminal history and failure to avail himself of rehabilitation opportunities he had been offered. The trial court found two mitigating circumstances existed but did not expressly find the defendant's age to be a mitigating circumstance. The court denied relief because the defendant's age was apparent, and because the case law allows a reviewing court to presume a sentencing court has considered all relevant circumstances before it. The case is an example, however, of an illegal sentence under 32.1(c) that relates to consideration of factors as required by law. This is not the same as an abuse of discretion claim based on the weighing of the factors. Rather it is an error of law that amounts to an abuse of discretion.

Memorandum decisions in which such claims have been raised show that claims under this subsection seem to be limited to those in which the sentence

is truly illegal, not simply excessive, based on the trial court's alleged abuse of its sentencing discretion, or unconstitutional. The latter claims are cognizable under Rule 32.1(a), not (c), except double jeopardy claims, which seem to fall under 32.1(c) when the claim is that consecutive sentences are unlawful and violate A.R.S. § 13-116. In *State v. Robinson*, No. 2 CA-CR 2017-0367-PR (mem. decision) (Ct. App. May 11, 2018), for example, in an untimely proceeding the defendant challenged the period of community supervision he was ordered to serve after the flat-time prison term. He characterized the claim as falling under 32.1(d), being held past expiration of the sentence, and 32.1(e), newly discovered evidence. Agreeing with the trial court's characterization of the claim, Division Two stated the defendant was essentially arguing the community supervision after the prison term "'is illegal and unconstitutional.'" *Id.* ¶ 8. "But," the court stated, "a claim of an illegal sentence is grounded in Rule 32.1(c), and a claim of an unconstitutional conviction or sentence is grounded in Rule 32.1(a)." *Id.* The court then found both claims "foreclosed in an untimely proceeding. *See* Ariz. R. Crim. P. 32.4(a)(2)(A)." *Id*.

In *State v. Worley*, No. 1 CA-CR 16-0580-PRPC, (mem. decision) (Ct. App. Oct. 19, 2017), all of the defendant's claims in pro se filings regarding his sentence, -- illegally enhanced, aggravated and consecutive – were characterized as falling under 32.1(c), and were found to be untimely and precluded. The basis for the claim that the sentence was improperly aggravated is not clear and so it is not clear whether it truly fell under Rule 32.1(c). Based on prior case law, circumstances in which a claim that a sentence has been unlawfully aggravated would be cognizable under 32.1(c), not (a) if

the trial court had relied on a factor that has, as a matter of law, been found to be an improper aggravating circumstance.

In *State v. Torrefranca*, No. 1 CA-CR 16-0435-PRPC (mem decision) (Ct. App. 2017), the defendant raised a number of challenges to his sentences in a successive proceeding. The court stated that the claims fell under 32.1(c) and were precluded, noting the claims included the following: double jeopardy due to "double-counting" or "quintuple counting of aggravating factors," and his claim that the sentences violated the Eighth Amendment. The court found the double jeopardy claim had no merit because *State v. Munninger*, 209 Ariz. 473 (App. 2005), which the defendant had relied on, was abrogated by *State v. Martinez*, 210 Ariz. 578, 585–86, ¶ 27 (2005). Although the double counting claim could be viewed as a true illegal-sentence claim, it is also constitutional in nature. And like the Eighth Amendment claim, it is arguably really a claim under Rule 32.1(a). This is why, perhaps, a comment would be helpful here.

Similarly, in *State v. Johnson*, No. 1 CA-CR 16-0448 (mem. decision) (Ct. App. Sept. 21, 2017), in the defendant's fourth PCR proceeding, he raised a number of claims including the claim that evidence relating to his mental health constitutes newly discovered material facts pursuant to Rule 32.1(e) and the trial court abused its discretion by not considering the "entire mental evaluation report" submitted at sentencing and failing to give appropriate weight to the mental health evidence as mitigating circumstances, relying on *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015), as a significant

change in the law. Division One said this about the defendant's challenge to his sentence: "In reality, Johnson's claims are for an abuse of discretion regarding his sentence. They are untimely and could have been raised in previous proceedings. *See* Ariz. R. Crim. P. 32.4(a). Because Johnson's claims are pursuant to Rule 32.1(c) (illegal sentence), they were properly subject to preclusion. *See* Ariz. R. Crim. P. 32.2(a)-(b); *see also State v. Peek*, 219 Ariz. 182, 182–83 ¶¶ 4–5 (2008) (claim of illegal sentence must be timely presented)." *Id.* ¶ 6.

State v. Skala, No. 1 CA-CR 16-0257-PRPC (mem. decision) (Ct. App. June 20, 2017). The defendant challenged the lifetime term of probation in a successive petition. The court characterized it as an illegal-sentence claim under 32.1(c) and found it precluded.

State v. Orona-Hardee, No. 2 CA-CR 2017-0114-PR (Ct. App. Apr. 24, 2017). The defendant raised under Rule 32.1(a)a claim that the trial court had incorrectly calculated his pre-sentence incarceration credit. The court noted that the claim might be more properly brought under 32.1(c), but ultimately did not decide the issue, as it was precluded either way.

State v. Prince, No. 2 CA-CR 2013-0015-PR (mem. decision) (Ct. App. May 8, 2013). The defendant's claim that he was not sentenced under the statute in effect at

the time he committed his crime was characterized as a claim of illegal sentence and the court found the claim was precluded.

State v. Rohla, No. 2 CA-CR 2009-0307-PR (mem. decision) (Ct. App. Feb. 25, 2010). The defendant argued the state's notice alleging historical priors had been defective, thus rendering his enhanced sentence illegal. The court considered this as a claim pursuant to Rule 32.1(c) and found it precluded.

State v. Cronen, No. 2 CA-CR 2007-0385-PR (mem. decision) (Ct. App. Jul. 10, 2008). The pleading defendant argued in the successive proceeding that his sentence on one of his counts had been improperly enhanced as a DCAC., maintaining on review from the trial court's denial of relief, that the sentence was illegal and constitutes fundamental and jurisdictional error that can be raised any time. In trying to avoid the preclusive effect of Rule 32.2., he tried to wrap the claim around an IAC claim. The trial court concluded this was a claim, which fell under Rule 32.1(c), was precluded. On review, the court of appeals agreed and denied relief, "even assuming the claim is meritorious," relying on *Swoopes* to get around the fundamental-error argument.

Notes of significant changes.

Rule 32.1: Scope of Remedy

The verbiage that a notice may be filed "subject to Rules 32.2 and 32.4(a)(2)" has been dropped as surplusage.

"Without paying any fee" has been relocated to a standalone provision.

"Of right" language has been removed.

The draft rule clarifies that any case in which the defendant was sentenced to death is a Rule 32 case.

Rule 32.1(c) was changed from "the sentence imposed is not in accordance with the sentence authorized by law," to "the sentence imposed exceeds the maximum authorized by law." But no substantive change was intended.

Rule 32.1(h) was restyled to provide increased clarity. The death penalty issue remains unresolved.

The comments were modestly restyled.

Rule 32.2: Preclusion of Remedy

The draft includes changes to 32.2(a)(3) proposed by Workgroup 1 in the August 31 version, but the workgroup's changes were restated in the November 9 draft to eliminate the phrase "sufficient constitutional magnitude."

Rule 32.2(b) was modestly restyled. Timeliness is shown by strikethrough, but the issue requires additional discussion. See further draft Rule 32.4(b)(3) ("time for filing".)

Rule 32.3: Nature of a Post-Conviction Proceeding and Relation to Other Remedies

Rule 32.3(b) no longer has "habeas corpus" in the title or in the body of the rule. Rather, these are now "other applications or requests for relief." But the comment to this rule was revised to account for a habeas corpus petition. The comment explains that a habeas petition "provides a remedy for individuals who are unlawfully committed, detained, confined, or restrained."

New Rule 32.3(c) provides that a defendant sentenced to death must proceed under Rule 32 rather than Rule 33, even, for example, if the defendant pled guilty to M-1 or other crimes (or presumably, admitted an aggravator.)

Rule 32.4: Filing a Notice Requesting Post-Conviction Relief

Note the change from the previous title, "Filing of Notice and Petition, and Other Initial Proceedings." The former title (and rule) was broad and unwieldly. By comparison, revised Rule 32.4 focuses only on the notice. Subsequent rules in the November 9 draft deal with subjects that overloaded the prior version of Rule 32.4, including the appointment of counsel (that is now in Rule 32.5), duty of counsel (now Rule 32.6), and the time for filing a petition (now Rule 32.7).

As noted in Rule 32.2 above, the issue of how to deal with an untimely petition remains unresolved. Judge McMurdie proposed a requirement of filing the notice within 90 days after discovering the basis of the claim. He believed that filing a notice "within a reasonable time" was too discretionary.

Rule 32.4(b)(4)(C) requires the clerk to send a notice to the appellate court only from a final ruling that grants relief. This removes the former requirement of sending the COA a ruling that denies relief. (The correct cross-reference in the November 9 provision should be to Rule 32.15. See further Rule 32.15 below.)

A newly proposed comment advises that the PCR notice informs the court of a possible need to appoint counsel and assists the court in deciding whether to summarily dismiss an untimely petition. This might help self-represented petitioners understand the purpose of a PCR notice, and the difference between a PCR notice and a PCR petition.

Rule 32.5: Appointment of Counsel

Rule 32.5(a) now clarifies that in non-capital cases, defendant's completion of an affidavit of indigency must be followed by a court finding of indigency before the defendant is entitled to appointed counsel. Similarly, in Rule 32.5(c), the court may appoint investigators, experts, and mitigation specialists for indigent defendants only.

Rule 32.5 appeared to be the best location for the new provision on attorney-client privilege and confidentiality, and this provision was added as new Rule 32.5(d). This provision requires prior counsel to share files with defendant's PCR counsel. But see the note in Rule 32.6(f) below that recommends changing the title of Rule 32.5(d).

Rule 32.6: Duty of Counsel; Defendant's Pro Se Petition; Waiver of Attorney Client Privilege

A new Rule 32.6(a) ("generally") succinctly highlights the duty of counsel: to investigate the defendant's case for any colorable claims. (This provision was previously buried in Rule 32.4(d).)

Rule 32.6(b) ("discovery") gives greater prominence to this new subject. (The provision on discovery was in Rule 32.4(h) of the August 31 version.) But see the note in the November 9 draft that requests further discussion of when discovery should be permitted.

Rule 32.6(c) ("counsel's notice of no colorable claims") was taken from Rule 32.4(d)(1) of the August 31 version. Relocating the provision in this manner allows the list of items to be numbered rather than lettered. However, although the first 5 items must be listed in the notice of no colorable claims, for items 6 through 18, counsel must simply avow that counsel has reviewed and considered the items.

Rule 32.6(f) ("attorney-client privilege") was derived from the second sentence of Rule 32.4(d) of the August 31 version. The provision advises that an IAC claim waives the attorney-client privilege. [Note: To avoid confusion and enhance accuracy, staff suggests that the title of Rule 32.5(d) (now, "attorney-client privilege and confidentiality for the defendant") be changed to "duty to share files;" and that the title of Rule 32.6(f) be changed from "attorney-client privilege" to "waiver of attorney-client privilege."]

The proposed comment to this rule shows by strikethrough the deletion of a reference to the rights of a pleading defendant because a pleading defendant does not proceed under Rule 32. However, the stricken language was retained in the comment to the corresponding Rule 33 provision.

Rule 32.7: Petition for Post-Conviction Relief

The November 9 version consolidates in a single location provisions of the August 31 version concerning the petition. Specifically:

- Rule 32.7(a), "deadlines for filing a petition for post-conviction relief," were taken from Rule 32.4(c), "time for filing a petition for post-conviction relief," of the August 31 version. But because there are more non-capital cases than capital cases, the non-capital deadline now appears first.

- Rule 32.7(b), "form of petition," 32.7(c), "length of petition," 32.7(d), "declaration," 32.7(e), "attachments," and 32.7(f), "effect of non-compliance," were taken from Rule 32.5 of the previous version.

Rule 32.8: Transcript Preparation

The provisions of this rule were derived from Rule 32.4(e) of the August 31 version.

Rule 32.9: Response and Reply; Amendments

These provisions were taken from Rule 32.6 of the prior version, but they were reorganized with subpart headings.

Rule 32.10: Assignment of a Judge

The subject matter of this rule was previously located in overloaded Rule 32.4, section (h). It is now a freestanding rule and includes (1) the provision for a change of judge, and (2) a new provision that allows the assigned judge to hear and decide related public records requests.

Rule 32.11: Court Review of the Petition, Response, and Reply; Further Proceedings

This rule derives from 32.6(d) of the August 31 version. It includes a new section (d) that allows the court to "order a competency evaluation if the defendant's competence is necessary for a presentation of the claim."

Rule 32.12: Informal Conference

This provision tracks Rule 32.7 of the previous version.

Rule 32.13: Evidentiary Hearing

The November 9 version is like the earlier version of Rule 32.8.

Rule 32.14: Motion for Rehearing

This rule derives from Rule 32.9 ("Review"), section (a) ("filing of a motion for rehearing") and section (b) ("disposition if motion granted") of the August 31 version. Separation of Rule 32.9 of the previous version into new Rules 32.14 and 32.15 has two advantages. First, the separation more clearly distinguishes post-ruling review by the trial court from appellate review of that ruling. Second, it reduces the need for fourth level subparts (lower case Roman numeral designations) in the appellate review rule, which enhances the rule's organization and makes it more user-friendly.

The stay provision of Rule 32.14(c) of the November 9 version comes from Rule 32.9(f) of the previous version; but note the cross-reference in the November 9 draft.

Rule 32.15: Notification to the Appellate Court

This provision was taken from Rule 32.9(c) of the previous version. As noted under Rule 32.4 above, notification is required only if the trial court grants relief. The duty to provide notice rests with defense counsel, not the superior court clerk. This conflicts with Rule 32.4 and the conflict needs to be reconciled.

Rule 32.16: Petition and Cross-Petition for Review

This rule replaces Rule 32.9(d) through (k) of the August 31 version. The substance is the same, but it has been reorganized for clarity.

Rule 32.17: Stay of Execution of a Death Sentence on a Successive Petition
Rule 32.18: Review of an Intellectual Disability Determination in Capital Cases
Rule 32.19: Extensions of Time; Victim Notice and Service

There are no notable changes from the August 31 draft in the three rules above.

Rule 32.20: Post-Conviction Deoxyribonucleic Acid Testing

The November 9 version eliminates the distinction between mandatory testing and discretionary testing contained in the August 31 version, because the drafters did not find this to be a meaningful distinction.

Note: Presumably, a petition for DNA testing can be filed independently of, and without the need for, a Rule 32 petition. If that's the case, should this provision be relocated outside of Rule 32?