

Task Force on the Arizona Rules of Criminal Procedure

Meeting Agenda

Friday, November 4, 2016

9:30 AM to 4:30 PM

State Courts Building * 1501 West Washington * Conference Room 345 * Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 1430 [WebEx link](#)

Item no. 1	Call to Order Introductory comments	<i>Hon. Joseph Welty, Chair</i>
Item no. 2 Page 3	Approval of the October 21, 2016 meeting minutes	<i>Judge Welty</i>
Item no. 3 Pages 79, 13, 33, 35, 39 Page 61 Pages 23, 47, 57	Discussion of workgroup drafts - Workgroup 1: Rule 40, and further review of Rules 1, 20, 24, 26, and 37 - Workgroup 2: Rules 30 and 32 - Workgroup 4: Rules 11, 27, 28	<i>Judge Duncan, Mr. Euchner, Mr. Vick, Mr. Landau</i> <i>Judge Cattani, Judge Welty</i> <i>Judge Gates, Ms. Kalman, Mr. Nash</i>
Item no. 4	Roadmap - Future Task Force meeting dates: November 18 December 9	<i>Judge Welty</i>
Item no. 5	Call to the Public Adjourn	<i>Judge Welty</i>

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

Task Force on the Arizona Rules of Criminal Procedure (“CRTF”)

State Courts Building, Phoenix

Meeting Minutes: October 21, 2016

Members attending: Hon. Joseph Welty, Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner (by telephone), Bill Hughes (by telephone), Kellie Johnson, Amy Kalman, Prof. Jason Kreag (by telephone), Hon. Mark Moran, Aaron Nash, Natman Schaye, Hon. Paul Tang (by telephone), Kenneth Vick

Absent: Hon. Maria Felix, Hon. Richard Fields, Hon. Pamela Gates, Hon. Eric Jeffery, Jerry Landau,

Staff: John Rogers, Mark Meltzer, Julie Graber, Sabrina Nash

Guests: Linley Wilson

1. Call to order, introductory comments, approval of the meeting minutes.

Judge Welty called the ninth Task Force meeting to order at 9:32 a.m. He welcomed the guest and members on the telephone. He noted that there have been 53 workgroup meetings to date. He believes the Task Force should have a complete draft of the rules in November. As reminders, the Chair stated that the Task Force would file a rule petition in January, that he would like to obtain pre-petition comments, and that this is primarily a restyling effort. He also reminded the workgroups that they would need to prepare a narrative summary of the changes to each rule. The Task Force will include these narratives in an appendix to the petition that will inform stakeholders about proposed revisions. The narrative could be a single sentence stating that a rule was restyled, or it could be much longer to describe significant changes to a proposed rule.

At a later point in the meeting, the Chair asked members to review the October 7, 2016 draft meeting minutes. Members had no corrections to the draft.

Motion: A member moved to approve the draft October 7 meeting minutes. Seconded, and the motion passed unanimously. **CRTF-009**

2. Workgroup 1. Workgroup 1 then presented two new rules (Rules 39 and 26). Judge Duncan also briefly discussed Rule 37.

Rule 39 (“victims’ rights”): Mr. Vick, who presented this rule, noted that the rule is generally more readable and contains fewer, long block paragraphs. For example, the definition of “victim” is a long paragraph in current Rule 39(a) (“definitions”), but it is broken into subparts in the draft rule. The draft provision allows victims who are in or out of custody to submit a written or recorded statement to the court, but it deletes the current qualifier, “if legally permissible and in the court’s discretion,” as superfluous. The definition of “criminal proceeding” in draft Rule 39(a) is substantially shorter, and

Mr. Vick noted that the definition aligns with the pertinent statutes. (The statutes are A.R.S. §§ 13-4401, et seq.) The workgroup also added a definition of the term “identifying and locating information” that allows use of the defined term elsewhere in the rule without a long explanation of its meaning.

Draft Rule 39(b) (“victims’ rights”) makes no substantive changes to the current provisions, but the workgroup restyled and reorganized the rule for increased clarity. For example, (b)(7) is set out as a list of items in the draft rather than as a block of text, which is the format of the current rule. Draft subpart (b)(9) combines current subparts (b)(8) and (b)(9). The “exception” in (b)(10) reverts to the “as necessary to protect the defendant’s constitutional rights” standard rather than “good cause,” which is the standard provided by the 2016 amendment. The members also discussed particular paragraphs in subpart (b)(11). In paragraph (A), the members agreed to delete the proposed additional words, “after charges are filed,” to make the rule compatible with the statutes. They also agreed on the most appropriate conjunction (“and” or “but”) to use between paragraphs (B) and (C) (they agreed to “and.”) They modified language in (b)(13) (which concerns the right to terminate) so it applies to interviews but not to depositions, which are ordered by the court.

The workgroup restyled Rule 39(c) (“assistance and representation.”) The Task Force discussed subpart (3), which the workgroup titled “conflicts of interest.” Members inquired whether the intent of the provision was to address a prosecutor’s actual, ethical conflicts of interest, or whether it instead addressed routine conflicts between the points of view of a prosecutor and a victim. The members agreed that “conflict of interest” implies that the State represents the victim, and they agreed to change this title to “conflicts.” However, if the prosecutor is not enforcing a victim’s rights, it would be appropriate for the prosecutor to refer the victim to an organization that could put the victim in touch with independent counsel. They therefore added the words “in asserting the victim’s rights” to this provision. Current Rule 39(c)(3) uses the phrase “appropriate legal referral, legal assistance, or legal aid agency.” The members changed this to “the appropriate state or local bar association for referral to a lawyer.” Notwithstanding the Task Force’s use of the term “the State” rather than “the prosecutor” throughout the draft criminal rules, the members concurred that in this rule, it was appropriate to use the term “prosecutor” because it refers to an individual.

The workgroup shorted the title of Rule 39(d) to “victim’s duties” and reorganized the section into subparts. Because one provision of the rule requires the prosecutor to notify the defendant and the court of an entity’s designation of a representative, the members agreed that the rule should require a corresponding notification when the entity changes the designation. Rules 39(e) (“waiver”) and 39(f) (“court enforcement of victim notice requirements”) were restyled. The members

discussed whether in Rule 39(g) (“appointment of a victim’s representative”) the court “may” or “must” appoint a representative for a minor or an incapacitated victim. The members concurred on using “must,” and noted that A.R.S. § 13-4403 provides further direction on this subject.

The members agreed to delete comments to the current rule. They had no further changes to Rule 39.

Rule 26 (“judgment, presentence report, presentencing hearing, sentence”): Mr. Euchner began his presentation of this rule by noting that the workgroup recommended deleting almost all the current comments, except for a portion of the comment to Rule 26.11 discussed below. With regard to Rule 26.1(a) and (b) (“definitions”), he inquired whether the judge makes a “finding” of guilt after a bench trial, or renders “a verdict.” The members preferred the latter. The members agreed to revise the text in Rule 26.2(b) (“time to render judgment.”) The revised draft provides that the court must enter judgment and “either pronounce sentence or set a date for sentencing under Rule 26.3.”

Mr. Euchner raised an issue under Rule 26.2(c) (“upon a death verdict”): does the court immediately enter a death sentence after a penalty phase verdict, or does the court defer entry if the defendant is pending sentencing on non-capital counts? During the discussion, it appeared that judges in Maricopa County enter the capital sentence immediately to facilitate defendant’s immediate removal to the Department of Corrections. The court may sentence the defendant on the non-capital counts at the same time, usually at defense counsel’s request, or the defendant may return later for sentencing on those counts. In Pima County, the judge defers entry of the death sentence until sentencing on the non-capital counts. The members did not reach consensus on whether the rule should make one of these procedures uniform statewide. However, Rule 31.2 provides that a notice of appeal in a capital case is sufficient as a notice “with respect to all judgments entered and sentences imposed in the case,” which forecloses the possibility of multiple appeal notices and appeals if the court sentences defendant on different counts at different times. However, Rule 24.1 requires a new trial motion “no later than 10 days after the verdict.” The immediate entry of a death sentence may preclude the defendant’s opportunity to make a Rule 24.1 motion, and the Chair suggested that the Task Force note this circumstance in its rule petition.

The title of draft Rule 26.2(d) is “factual determination.” In its revisions to Rule 17, Workgroup 3 addressed a situation when the defendant enters a plea with a later determination of its factual basis. Members accordingly agreed to delete Rule 26.2(d), subject to its discussion of Rule 17 later during the meeting and potential modifications to that rule.

In Rule 26.3(a) (“sentencing date”), the members added the word “trial” before “proceedings” in section (a)(1)(C). In Rule 26.3(b) (“time extension”), the members changed the word “must” in the phrase, “the new date must be no later than...” to “should.” The members moved draft Rule 26.6(e)(3) regarding the “admissibility” of certain statements to a more prominent location, Rule 26.4(d), and they retitled the provision, “inadmissibility.” The members discussed whether the statements referred to in the rule are by the defendant or by someone else, but they decided to make no change because the draft rule tracks the current one. The members discussed the comment to Rule 26.5 (“diagnostic evaluation”) and they agreed it was not necessary to retain it. The workgroup restyled Rules 26.6 (“court disclosure of reports”), 26.7 (“presentence hearing”), and 26.8 (“the State’s disclosure duty”), and the Task Force made no further changes of significance to these rules. The members agreed to delete the second sentence of Rule 26.9 (“the defendant’s presence”) because Rule 19.2 addresses the same subject. The members made syntactical changes to Rule 26.10 (“pronouncing judgment and sentence”).

Rule 26.11 concerns “a court’s duty after pronouncing sentence.” The workgroup revised the current rule to make it gender neutral. In section (b), Task Force members deleted “after making the disclosures in (a)” as superfluous. They agreed to retain a portion of the comment to this rule about defense counsel’s duties concerning the notice of appeal. A member noted that the comment does not include text that requires counsel to advise a pleading defendant of the opportunity to file a Rule 32 of-right petition. Although Rule 32 describes the of-right petition, the member said that Rule 26.11 should expressly provide for notice to the defendant of the right. A member of Workgroup 1 suggested a new provision in Rule 26.11(a) to address this, and the Chair sent the rule back to the workgroup to draft language for this new provision.

Draft Rule 26.12 (“defendant’s compliance with monetary terms of a sentence”) has three subparts, one less than the current rule. The members agreed that it was not necessary to include current subpart (c)(3) (“time limits – restitution and non-monetary obligations”) in the revised rule because this provision explicitly deals with the payment of obligations that do not involve the court.

The members proceeded to discuss Rule 26.13 (“consecutive sentences”). Some members wanted to remove this provision to avoid a presumption for consecutive sentences. Members reviewed A.R.S. § 13-711 and concluded that the statute does not create a presumption, but rather requires the sentencing judge to provide reasons for concurrent sentences. Members were concerned that if the Task Force removed this rule, judges may overlook the statutory requirement, which would result in more, not fewer, consecutive sentences. Removal would also imply a substantive change. To address the issue, the members agreed to keep the rule but added a new last sentence that states,

“There is no presumption for consecutive sentences.” In addition, members agreed to delete from the draft the phrase “unless consecutive sentences would be illegal” because the Department of Corrections when consulting this rule might improperly determine whether a sentence “would be illegal.”

The workgroup restyled Rules 26.14 (“resentencing”), 26.15 (“special procedure for imposing a death sentence”), and 26.16 (“entry of judgment and sentence; warrant of authority to execute sentence.”) Task Force members had no significant revisions to the workgroup drafts, which concluded the discussion of Rule 26.

Rule 37 (“report of court dispositions”): Judge Duncan advised that Workgroup 1 reviewed and made restyling changes to this rule. However, the workgroup’s presentation of this rule to the Task Force is pending its further review by Mr. Nash, and anticipated comments from Mr. Landau at the November 4 Task Force meeting.

3. Workgroup 3. Ms. Johnson and Mr. Eckstein presented two new rules, Rules 17 and 29, on behalf of the workgroup.

Rule 17 (“pleas of guilty and no contest”): Ms. Johnson began by noting a modification to the title of current Rule 17.1 (currently “pleading by defendant;” now “the defendant’s plea.”) The workgroup reorganized the body of the rule. Telephonic pleas and pleas by mail, which are currently in the middle of Rule 17.1, are at the end of the draft version. Draft Rule 17.1(f) requires a certification of defendant’s medical condition as a requisite to entering a telephonic plea. The workgroup deleted the comments to Rule 17.1 as unnecessary for an understanding of the rule, as well as other comments except as expressly noted below.

The title of draft Rule 17.2 (“advising of rights and consequences of a guilty or no contest plea”) is considerably shorter than the current title. The shortened title does not include the phrase “submitting on the record,” but this is in the immigration provision of the rule. The Task Force deleted a phrase in current Rule 17.2(f) and in the workgroup’s corresponding draft that requires the court to make an immigration statement “if [the defendant] is not a citizen of the United States.” They agreed to this deletion because another portion of the same rule precludes the court from requiring the defendant to disclose his or her legal status in this country. The workgroup restyled and reorganized Rule 17.3 (“a court’s duty, etc.”). Rule 17.3(b) is a provision for “determining a factual basis.” The members relocated text from Rule 26.2(d) to Rule 17.3(b), with modifications to the text as shown by Ms. Graber on-screen.

In Rule 17.4 (“pleas negotiations and agreements”), the members changed the current term used in section (d) (“acceptance of plea”) from “negotiated plea” to “submitted plea” in the draft. The workgroup’s draft Rule 17.4(a)(2) requires the parties at a settlement conference “to obtain settlement authority.” Some members felt this

provision is necessary to avoid prosecutors appearing at a conference without authority. However, others felt that a prosecutor without settlement authority still could attend the conference in good faith, consider discussions at the conference, and make a settlement offer thereafter. The members then revised Rule 17.4(a)(2) in a manner that conforms to this discussion. In section (a)(3), the members also added a provision for “the victim’s representative.” The workgroup’s draft of Rule 17.4(c) (“determining accuracy, voluntariness, etc.”) included language derived from a comment to the current rule, but the members removed it because it was still like a comment (it said that an oral procedure existed to ensure that the public was aware of the terms of the plea) and it had no substantive impact. The members also deleted as surplusage a provision in this section that stated the court “also must comply with Rules 17.2 and 17.3.” Rule 17.4(g) concerns an “automatic change of judge.” Members revised this section to clarify the defendant has only one change of judge under either Rule 17.4(g) or Rule 10.2.

Members approved the workgroup’s draft of Rule 17.5 (“withdrawal of a plea”), including the term “manifest injustice,” but they improved the clarity of the second sentence. One member suggested a revision that would permit “a party” to withdraw from a plea, but other members thought this would be an incorrect statement of law and maintained the term “a defendant.” In Rule 17.6 (“admitting a prior conviction”), the members discussed whether the proper term at the end of this one-sentence rule was “in open court” or “on the stand.” They concluded with an agreement to use the term “in court.” They deferred a review of the second paragraph of the comment to Rule 17.6 until Judge Jeffery was present.

Rule 29 (“restoring civil rights or vacating a conviction”): Mr. Eckstein noted that the workgroup revised the title of this rule by using verbs rather than nouns. Current Rule 29(a) refers to “probationers.” The draft version instead uses the term “persons,” which is more apt in the context of the rule. The members split on whether to retain the comment to Rule 29.1. Some found it helpful; others thought it would require repeated updating due to new statutes or changes in statutory references. On a straw vote and by a slim majority, the members agreed to retain the comment. Following discussion, the members agreed to delete the comment to Rule 29.2 (“application, etc.”) The workgroup changed “prosecutor” in Rule 29.2 to “prosecuting agency.” On the “hearing date” in Rule 29.3, the members changed the workgroup’s use of “no sooner than 30 days” to “at least 30 days.” The members modified language in Rule 29.4 (“State’s response”) to provide that the State must send its response to the applicant only if the applicant has no attorney. The workgroup rephrased Rule 29.5 (“disposition”) in the active voice and deleted the comment to the rule. Current Rules 29.6 and 29.7 pertain to sex trafficking victims. The workgroup combined both rules into a single Rule 29.6 (“special provisions for sex trafficking victims.”) It added a requirement that the clerk transmit a copy of the

order vacating the conviction to the victim. Task Force members had no other revisions or suggestions concerning Rule 29.

4. Workgroup 2. Judge Cattani presented Workgroup 2's drafts of Rules 31 and 38.

Rule 31 ("appeal from the superior court"): Judge Cattani began his presentation by requesting the members' input on several particular provisions of this lengthy rule, so the members did not discuss the rule's contents sequentially.

Draft Rule 31.8 ("the record on appeal") includes a new provision (b)(1)(B)(ii) that requires a certified transcript of "all trial proceedings" excluding voir dire. Unlike the current rule, the draft rule encompasses preparation of transcripts of opening statements and final arguments. After discussion, members agreed with the exclusion of voir dire transcripts, which might be costly and not particularly helpful on appeal, although a party may still request these transcripts. Members also agreed with inclusion of the opening and closing statements, which some counsel currently request. Members also discussed the times proposed by the draft rule. The workgroup's draft follows the current rule and requires the appellant to provide additional designations within 5 days after filing the notice of appeal; appellee's designations are due within 12 days after the notice. The appellee often does not even assess the record to determine appropriate designations until the appellee receives the opening brief and reviews the issues on appeal. If the appellant files an *Anders* brief, appellee might need nothing additional. Members agreed that these limits were impractical and should be longer. Accordingly, they agreed that the appellant would have 30 days after filing the notice to make additional designations, and that appellee would have 30 days after the filing of the opening brief to designate. These expanded times apply both to designating records under Rule 31.8(a), and to transcripts under Rule 31.8(b). If appellee designates additional records, and because the superior court would have transmitted the record to the appellate court before the filing of the opening brief, the members added a requirement that in this event, "the superior court must supplement the record accordingly." In draft Rule 31.9 ("transmission of the record to the appellate court"), members discussed the feasibility of the proposed provisions for rural counties, but made no changes to the draft during the discussion.

In the "definitions" section of Rule 31.1, members agreed to delete as unnecessary the definitions of "motion" and "stipulation," which came from the civil appellate rules ("ARCAP"). Members discussed moving the definition of "entry" to Rule 1 so it had general application, but others favored retaining it in Rule 31.1 because it illuminates the time provisions of Rule 31.2. The workgroup will discuss this. Members agreed to the appropriateness of phrasing for the timing provisions of Rule 31.2. In this regard, they also considered whether draft Rule 31.2(a)(3) should require a defendant who receives an

order for a delayed appeal under to subsequently file a notice of appeal, or whether the order should serve as the notice. Because a notice of appeal specifically operates as a trigger for a variety of subsequent events, they agreed to leave the provision as it is, which requires the defendant to file a subsequent notice.

The members' revisited Rule 31.2 (they had discussed this in conjunction with Rule 26.2), and again concurred that a notice of appeal in a capital case includes subsequent sentencing on non-capital counts in that case. To avoid a "trap for the unwary," they repeated a recommendation that Rule 24.1 specifically state that an order under that rule requires the filing of a separate notice of appeal. [Staff's proposed language for a new Rule 24.1(e): Notice of Appeal. A party may appeal an order granting or denying a motion under this rule by filing a separate notice of appeal.] In the title of draft Rule 31.3 ("suspension of these rules, etc."), members deleted the words "perfection of an appeal" from the title. In draft Rule 31.4 ("consolidation of appeals"), members deleted the words "while an appeal is pending" and "while the appeal is stayed" and substituted revised text as shown on-screen. This led to a discussion about whether the appellate court "stays" an appeal, a term commonly used, or whether it "suspends" an appeal, which is the terminology used in draft Rule 31.3. The ARCAP uses the term "suspension." The workgroup will discuss further which term is most appropriate.

The members corrected a cross-reference in Rule 31.5. They discussed a new provision in Rule 31.6(d) regarding word limits. They modified the provision and deleted a requirement that "a document must average no more than 280 words per page." In Rule 31.10 ("content of briefs") section (a) ("appellant's opening brief"), the members added the word "suggested" to a phrase that now says, "in the following suggested order." They also moved up in that suggested order a "statement of the issues" so it now follows a "table of citations" and precedes an "introduction." Members made conforming changes to the numbering in Rule 31.10(j) ("amicus briefs.") In Rule 31.15 ("amicus briefs"), subpart (b)(1), they deleted a requirement in the workgroup's draft that an amicus brief state on its cover that it is filed with the parties' consent. They also modified (b)(1) to clarify that the amicus must file the consent. The members made a variety of corrections and grammatical changes elsewhere in Rule 31. Task Force approval of this rule is pending workgroup review of items noted above.

Rule 38 ("suspension of prosecution for a deferred prosecution program"): Judge Cattani noted the workgroup's straightforward restyling of this rule. After a review of pertinent statutes, the workgroup concluded that if the prosecutor files a motion for deferred prosecution under Rule 38.1 ("application for a suspension order"), and if the defendant is eligible, the court has no discretion to deny the motion; the court must grant it. A similar principle applies to a notice to resume prosecution under Rule 38.2 ("resuming prosecution.") The workgroup changed references to "the prosecutor" in this

rule to “the State.” Members agreed to delete the comments because the body of the rule incorporates Rule 8 concepts. Members had no other changes.

5. Roadmap; call to the public; adjourn. The Chair advised that the next Task Force meeting would be on Friday, November 4, 2016. He requested the members to contact staff to confirm their availability. Workgroup 4 has multiple meetings next week, and Ms. Kalman invited suggestions from Task Force members concerning Rule 11. Workgroup 2 intends to complete Rule 32 before November 4 during an extended Saturday meeting. There was no response to a call to the public. The meeting adjourned at 3:59 p.m.

I. General Provisions

Rule 1. Scope, Purpose and Construction, Computation of Time, Definitions, Size of Paper, and Other General Provisions

Rule 1.1. Scope

These rules govern procedures in all criminal proceedings in Arizona state courts, unless specifically stated otherwise in a particular rule.

Rule 1.2. Purpose and Construction

These rules are intended to provide for the just and speedy determination of every criminal proceeding. Courts and parties should construe these rules to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.

Rule 1.3. Computation of Time

(a) General Time Computation. When computing any time period more than 24 hours, prescribed by these rules, by court order, or by an applicable statute, the following rules apply:

- (1) *Day of the Event.*** Exclude the day of the act or event from which the designated time period begins to run.
- (2) *Last Day.*** Include the last day of the period, unless it is a Saturday, Sunday or legal holiday, in which case the period ends on the next day that is not a Saturday, Sunday, or legal holiday.
- (3) *Time Period Less Than 7 Days.*** If the time period is less than 7 days, exclude intermediate Saturdays, Sundays and legal holidays from the computation.
- (4) *Next Day.*** The “next day” is determined by counting forward when the period is measured after an event, and backward when measured before an event.
- (5) *Additional Time After Service.*** If a party may or must act within a specified time after service and service is made under a method authorized by Rule 1.8(c)(2)(C) or (D), 5 calendar days are added after the specified time period would otherwise expire under (a)(1)-(4). This provision does not apply to the clerk’s distribution of notices, minute entries, or other court-generated documents.

(b) If an Arraignment Is Not Held. If an arraignment is not held under Rule 14.1(d), the date of arraignment for the purpose of computing time is the date the defendant receives notice of the next court date under Rule 5.8 and Rule 12.10.

(c) Entry. A court order is entered when the clerk files it.

Rule 1.4. Definitions

(a) The Defendant. “The defendant” is a person named as such in a complaint, indictment, or information. “The defendant” as used in these rules includes an arrested person who at the time of arrest is not named in a charging document. “The defendant” in the context of certain rules includes the attorney who represents the defendant.

(b) Limited Jurisdiction Court. A limited jurisdiction court is a justice court under A.R.S. §§ 22-101 et seq., or a municipal court under A.R.S. §§ 22-401 et seq.

(c) Magistrate. “Magistrate” means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes the Chief Justice and justices of the Supreme Court, judges of the superior court, judges of the court of appeals, justices of the peace, and judges of a municipal court.

(d) Parties. “Parties” means the State of Arizona and the defendants in a case. Use of the word “party” in these rules means either, or any, party.

(e) Person. “Person” includes an entity.

(f) Presiding Judge.

(1) For the Superior Court. The superior court presiding judge is the county’s presiding judge. In a county that has only one superior court judge, that judge is the presiding judge. In other counties, the Chief Justice of the Supreme Court designates the presiding judge, who may appoint other judges to carry out one or more of the presiding judge’s duties.

(2) For a Limited Jurisdiction Court. If a court consists only of one judge, that judge is the presiding judge. In courts having more than one judge, the presiding judge is designated by the appropriate authority.

(g) The State. “The State” means the State of Arizona, or any other Arizona state or local governmental entity that files a criminal charge in an Arizona court. “The State” in the context of certain rules includes the prosecutor representing the State.

Rule 1.5. Interactive Audiovisual Systems

(a) Generally. If the appearance of a defendant or counsel is required in any court, the appearance may be made by using an interactive audiovisual system that complies with the provisions of this rule. Any interactive audiovisual system must meet or exceed minimum operational guidelines adopted by the Administrative Office of the Courts.

(b) Requirements. If an interactive audiovisual system is used:

- (1)** the system must operate so the court and all parties can view and converse with each other simultaneously;
- (2)** a full record of the proceedings must be made consistent with the requirements of applicable statutes and rules; and
- (3)** provisions must be made to:
 - (A)** allow for confidential communications between the defendant and defendant's counsel before, during, and immediately after the proceeding;
 - (B)** allow a victim a means to view and participate in the proceedings and ensure compliance with all victims' rights laws;
 - (C)** allow the public a means to view the proceedings consistent with applicable law; and
 - (D)** allow for use of interpreter services when necessary and, if an interpreter is required, the interpreter must be present with the defendant absent compelling circumstances.

(c) When a Defendant May Appear by Videoconference.

- (1) *In the Court's Discretion.*** A court may require a defendant's appearance by use of an interactive audiovisual system without the parties' consent at any of the following:
 - (A)** an initial appearance;
 - (B)** a misdemeanor arraignment;
 - (C)** a not-guilty felony arraignment;
 - (D)** a hearing on a motion to continue that does not include a waiver of time under Rule 8;
 - (E)** a hearing on an uncontested motion;
 - (F)** a pretrial or status conference;

(G) a change of plea in a misdemeanor case; or

(H) an informal conference held under Rule 32.7.

- (2) **Generally Not Permitted.** A court may not require a defendant's appearance by use of an interactive audiovisual system at any trial, contested probation violation hearing, felony sentencing, or felony probation disposition hearing, unless the court finds extraordinary circumstances and the parties consent by written stipulation or on the record.
- (3) **By Stipulation.** For any proceeding not included in (c)(1) and (c)(2), the parties may stipulate that the defendant may appear at the proceeding by use of an interactive audiovisual system. The parties must file a stipulation before the proceeding begins or state the stipulation on the record at the start of the proceeding. Before accepting the stipulation, the court must find that the defendant knowingly, intelligently and voluntarily agrees to appear at the proceeding by use of an interactive audiovisual system.
- (4) **Change in Hearing's Scope.** If the scope of a hearing expands beyond that specified in (c)(2) and (c)(3), the court must reschedule a videoconference and require the defendant's personal appearance.

Rule 1.6. Form of Documents

(a) **Caption.** Documents filed with the court must contain the following information as single-spaced text, typed or printed, on the first page of the document:

- (1) to the left of the center and at the top of the page:
 - (A) the filing attorney's or self-represented litigant's name, address, telephone number, and email address; and
 - (B) if an attorney, the attorney's State Bar of Arizona attorney identification number, any State Bar of Arizona law firm identification number, and the name of the party the attorney represents;
- (2) centered on the page and immediately below the filer information, the title of the court;
- (3) below the title of the court and to the left of the center of the page, the title of the action or proceeding;
- (4) opposite the title, in the space to the right of the center of the page, the case number of the action or proceeding; and
- (5) immediately below the case number, a brief description of the document.

(b) Document Format.

- (1) *Generally.*** Unless the court orders otherwise, all filed documents, other than a document submitted as an exhibit or attachment to a filing, must be prepared as follows:

 - (A) *Text and Background.*** The text must be black on a plain white background. All documents filed must be single-sided.
 - (B) *Type Size and Font.*** Every typed document must use at least a 13-point type size. The court prefers proportionally spaced serif fonts. Footnotes must be in at least a 13-point type size and must not appear in the space required for the bottom margin.
 - (C) *Page Size.*** Each page of a document must be 8½ by 11 inches.

 - (i)** Exhibits, attachments to documents, or documents from jurisdictions outside Arizona that are larger than the specified size must be folded to the specified size or folded and fastened to pages of the specified size.
 - (ii)** Exhibits or attachments to documents smaller than the specified size must be fastened to pages of the specified size.
 - (iii)** A document that is not in compliance with these provisions may be filed only if compliance is not reasonably practicable.
 - (D) *Margins and Page Numbers.*** Page margins must be at least one inch on the top and bottom of the page and between one inch and 1½ inches on each side. Except for the first page, the bottom margin must include a page number.
 - (E) *Handwritten Documents.*** Handwritten documents are discouraged, but if a document is handwritten, the text must be legibly printed and not include cursive writing or script.
 - (F) *Line Spacing.*** Text must be double-spaced and may not exceed 28 lines per page, but headings, quotations, and footnotes may be single-spaced. A single-spaced quotation must be indented on the left and right sides.
 - (G) *Headings and Emphasis.*** Headings must be underlined, in italics, or in bold type, or in any combination of the three. Underlining, italics, or bold type also may be used for emphasis.
 - (H) *Citations.*** Case names and citation signals must be in italics or underlined.

- (I) *Originals.* Unless filing electronically, only originals may be filed. If it is necessary to file more than one copy of a document, the additional copies may be photocopies or computer-generated duplicates.
 - (J) *Court Forms.* Printed court forms may be single-spaced, but those requiring a judge's or commissioner's signature must be double-spaced. Printed court forms must be single-sided. All printed court forms must be on paper of sufficient quality and weight to assure legibility upon duplication, microfilming, or imaging.
- (c) **Electronically Filed Documents.** If a court has an electronic filing portal, a party may file a document electronically.

(1) ***Format.***

- (A) *File Type.* A document filed electronically that contains text, other than a scanned document image that is submitted under this rule, must be in a text-searchable .pdf, .odt, or .docx format or other format permitted by Administrative Order. *A text-searchable .pdf format is preferred.* A proposed order must be in a form that permits it to be modified, such as .odt or .docx format or other format permitted by Administrative Order, and must not be password protected.
- (B) *File Size.* A document exceeding the file size limits allowed by the court's electronic filing portal may be broken up into multiple files to accommodate such a limit.

(2) ***Formats of Attachments.***

- (A) *Generally.* An exhibit and other attachment to an electronically filed document may be filed electronically if it is attached to the same submission as either a scanned image or an electronic copy using an approved file type and format.
- (B) *Official Records.* A scanned copy of an official record may be filed electronically if it contains an official seal of authority or its equivalent.
- (C) *Notarized Documents.* A scanned copy of a notarized document may be filed electronically if it contains the notary's signature and stamp or seal.
- (D) *Certified Mail, Return Receipt Card.* When establishing proof of service by a form of mail that requires a signed and returned receipt, the return receipt may be filed electronically if both sides of the return receipt card are scanned and filed.

(E) *National Courier Service.* When establishing proof of service by a national courier service, the receipt for such service may be filed electronically by scanning and filing the receipt.

(3) ***Bookmarks and Hyperlinks.***

(A) *Bookmarks.* A bookmark is a linked reference to another page within the same document. An electronically filed document may include bookmarks. A document that is incapable of bookmarking may be made accessible by a hyperlink. Bookmarks are encouraged.

(B) *Hyperlinks.* A hyperlink is an electronic link in a document to another document or to a website. An electronically filed document may include hyperlinks. Material that is not in the official court record does not become part of the official record merely because it is made accessible by a hyperlink. Hyperlinks are encouraged.

(4) ***Originals.*** An electronically filed document (or a scanned copy of a document filed in hard copy) constitutes an “original” under Arizona Rule of Evidence 1002.

(5) ***Signature.*** All electronic filings must be signed. A person may sign an electronic document by placing the symbol “/s/” on the signature line above the person’s name. An electronic signature is equivalent to an ink signature on paper.

Rule 1.7. Filing and Service of Documents

(a) **“Filing with the Court” Defined.** The filing of a document with the court is accomplished only by filing it with the clerk. If a judge permits, a party may submit a document directly to a judge, who must transmit it to the clerk for filing and notify the clerk of the date of its receipt.

(b) **Effective Date of Filing.**

(1) ***Paper Documents.*** A document is deemed filed on the date the clerk receives and accepts it. If a document is submitted to a judge and is later transmitted to the clerk for filing, the document is deemed filed on the date the judge receives it.

(2) ***Electronically Filed Documents.*** An electronically filed document is filed on the date and time the clerk receives it. Unless the clerk later rejects the document based on a deficiency, the date and time shown on the email notification from the court’s electronic filing portal or as displayed within the portal is the effective date of filing. If a filing is rejected, the clerk must promptly provide the filing party with an explanation for the rejection.

(3) **Late Filing Because of an Interruption in Service.** If a person fails to meet a deadline for filing a document because of a failure in the document’s electronic transmission or receipt, the person may file a motion asking the court to accept the document as timely filed. On a showing of good cause, the court may enter an order permitting the document to be deemed filed on the date that the person originally attempted to transmit the document.

(4) **Incarcerated Parties.** If a party is incarcerated and another party contends that the incarcerated party did not timely file a document, the court must deem the filing date to be the date when the document was delivered to jail or prison authorities to deposit in the mail.

(c) **Service of All Documents Required; Manner of Service.** Every person filing a document with any court must serve a copy of the document on all other parties as follows:

(1) **Serving an Attorney.** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) **Service Generally.** A document is served under this rule by any of the following:

(A) handing it to the person;

(B) leaving it:

(i) at the person’s office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person’s dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it by U.S. mail to the person’s last-known address—in which event service is complete upon mailing;

(D) delivering it by any other means, including electronic means other than that described in (c)(2)(E), if the recipient consents in writing to that method of service or if the court orders service in that manner—in which event service is complete upon transmission; or

(E) transmitting it through an electronic filing service provider approved by the Administrative Office of the Courts, if the recipient is an attorney of record in the action—in which event service is complete upon transmission.

- (3) **Certificate of Service.** The date and manner of service must be noted on the last page of the original of the served document or in a separate certificate, in a form substantially as follows:

A copy has been or will be mailed/mailed/hand-delivered [select one]

on [insert date] to:

[Name of opposing party or attorney]

[Address of opposing party or attorney]

If the precise manner in which service has actually been made is not noted, it will be presumed that the document was served by mail. This presumption will only apply if service in some form has actually been made.

Rule 1.8. Clerk's Distribution of Minute Entries and Other Documents

(a) **Generally.** The clerk must distribute, either by U.S. mail, electronic mail, or attorney drop box, copies of every minute entry to all parties.

(b) **Electronic Distribution.** The clerk may distribute minute entries, notices and other court-generated documents to a party or a party's attorney by electronic means. Electronic distribution of a document is complete when the clerk transmits it to the email address that the party or attorney has provided to the clerk.

Rule 1.9. Motions, Oral Argument, and Proposed Orders

(a) **Content.** A motion must include a memorandum that states facts, arguments, and authorities pertinent to the motion.

(b) **Service of Motion; Response; Reply.** The moving party must serve the motion on all other parties. Within 10 days after service, another party may file and serve a response, and, within 3 days after service of a response, the moving party may file and serve a reply. A reply must be directed only to matters raised in a response. If no response is filed, the court may deem the motion submitted on the record.

(c) **Length.** Unless the court orders otherwise, a motion or response, including a supporting memorandum, may not exceed 11 pages, exclusive of attachments, and a reply may not exceed 6 pages, exclusive of attachments.

(d) **Waiver of Requirements.** On a party's request or on its own, the court may waive a requirement specified in this rule, or it may overlook a formal defect in a motion.

(e) **Oral Argument.** On a party's request or on its own, the court may set a motion for argument or hearing.

(f) Proposed Orders. A proposed order must be prepared as a separate document and may not be included as part of a motion, stipulation, or other document. There must be at least two lines of text on the signature page of a proposed order. A party must serve the proposed order on the court and all other parties. A party must not file a proposed order, and the court will not docket it, until a judge has reviewed and signed it. Absent a notice of filing, proposed orders will not be part of the record.

Rule 11. Incompetence and Mental Examinations

Rule 11.1. Definitions, Effect of Incompetence, and Right to Counsel

(a) Definitions.

- (1) ***Mental Illness, Defect, or Disability*** means a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms, including congenital mental conditions, conditions resulting from injury or disease, and developmental disabilities as defined in A.R.S. § 36-551.
- (2) ***Incompetent to stand trial*** means a defendant is unable to understand the nature and objective of the proceedings or to assist in his or her defense because of a mental illness, defect, or disability.

(b) Effect of Incompetence. A defendant may not be tried, convicted, sentenced, or punished for a public offense while that defendant is incompetent. A defendant is not incompetent to stand trial merely because the defendant has a mental illness, defect, or disability. This rule does not bar a court from proceeding under A.R.S. § 36-3707(D).

(c) Right to Counsel. During proceedings under this rule, a defendant is entitled to representation by counsel as provided in Rule 6. [limited jdx courts?]

Rule 11.2. Motion for an Examination of a Defendant's Competence to Stand Trial

(a) Motion and Order for Examination.

- (1) ***Generally.*** At any time after an information is filed or an indictment is returned in superior court, or a misdemeanor complaint is filed, the court may, on motion or on its own, order a defendant's examination to determine whether the defendant is competent to stand trial.
- (2) ***Motion to Determine Competence.*** The moving party or the court must state facts for the requested mental examination.
- (3) ***Parties Authorized to Move for Competence Determination.*** Any party, including a co-defendant, may move for an evaluation of competence.
- (4) ***Proposed Examiners.*** A party's motion may include a list of 3 mental health experts qualified under Rule 11.3 to conduct the examination. Any other party may include such a list in its response to the motion.

- (b) **Medical and Criminal History Records.** Within 3 days of the appointment of experts, the parties must provide the examining mental health expert with all of the defendant's available medical and criminal history records. [FLAG- this breaks us from the statute. We believe this is more workable, cuts out an unnecessary middle party, and is more consistent with defendant's privacy protections.]
- (c) **Preliminary Examination.** Under A.R.S. § 13-4503(C), a court may order the defendant to undergo a preliminary examination to assist the court in determining if reasonable grounds exist to order the defendant's further examination.
- (d) **Jurisdiction.** The superior court has exclusive jurisdiction over all competence hearings. If a limited jurisdiction court determines that reasonable grounds exist for further competence hearings, it must immediately transfer the matter to the superior court for the appointment of mental health experts.
- (e) **If Defendant Is Competent.** If any court determines that a defendant is either competent or restored to competence, regular proceedings must proceed without delay.
- (f) **Dismissal of Misdemeanor Charges.** If the court finds that a person has been previously adjudicated incompetent to stand trial under this rule, the court may hold a hearing to dismiss any misdemeanor charge against the incompetent person under A.R.S. § 13-4504.

Rule 11.3. Appointment of Experts

(a) Appointment of Experts.

- (1) **Definition of a Mental Health Expert.** "Mental health expert" means a physician licensed under A.R.S. §§ 32-1421 to -1437 or 32-1721 to -1730; or a psychologist licensed under A.R.S. §§ 32-2071 to -2076.
- (2) **Generally.** If the court finds that reasonable grounds exist for a competence examination, it must appoint two or more qualified mental health experts to:
 - (A) examine the defendant;
 - (B) report to the court in writing within 10 business days after examining the defendant; and
 - (C) testify, if necessary, about the defendant's competence.
- (3) **Psychiatry Background.** A party may request or the court may order that one of the mental health experts be a physician specializing in psychiatry.

- (4) **Stipulation for Only One Examiner.** With the court's approval, the State and the defendant may stipulate to the appointment of only one expert.
 - (5) **Examiner Qualifications.** A mental health expert must be:
 - (A) familiar with Arizona's standards and statutes for competence;
 - (B) familiar with the treatment, training and restoration programs that are available in Arizona; and
 - (C) approved by the court as meeting court-developed guidelines, including demonstrated experience in forensics matters, required attendance at a court-approved training program of not less than 16 hours and any court-required continuing forensic education programs, and annual review criteria.
 - (6) **Replacement.** If the appointed expert is unable to examine the defendant within the time allotted, the expert must immediately inform the court, and the court may appoint a different expert to perform the examination.
- (b) **Custody Status of the Defendant During Competence Proceedings.** Pending the court's determination of competence, the court must determine the defendant's custody status under A.R.S. § 13-4507.
- (c) **Expert Report.** An expert's report must conform to A.R.S. § 13-4509.
- (d) **Additional Expert Assistance.** If necessary for an adequate determination of the defendant's mental competence, the court may appoint additional experts and order the defendant to submit to additional physical, neurological, or psychological examinations.

Rule 11.4. Disclosure of Experts' Reports

(a) Reports of Appointed Experts.

- (1) **Deadline.** An expert appointed under Rule 11.3 must submit a report to the court within 10 business days after the expert's examination is completed.
- (2) **Availability.** An expert's report must be made available to the examined defendant and the State, except that any [inculpatory] statement by the defendant about the charged offense (or any summary of such a statement) [or any other charged or uncharged offense or aggravating factor] may be made available only to the defendant. Upon receipt, court staff will copy and provide the expert's report to the court and defense counsel. Defense counsel is responsible for editing a copy of the report for the State. Defense counsel must provide the edited report to the State within 3 days of receipt of the unedited report.

(b) Reports of Other Experts. For any mental health expert who has personally examined the defendant or any evidence in connection with the case, the examined defendant and the State must disclose to each other at least 15 business days before any Rule 11.5 hearing:

- (1) the expert's name and address;
- (2) the results of any mental examinations, scientific tests, experiments, or comparisons conducted on the defendant or on any evidence in the case by or on the behalf of the mental health expert; and
- (3) any written report or statement in connection with the case.

Rule 11.5. Hearing and Orders

(a) Hearing. Within 30 days after the experts appointed under Rule 11.3 submit their reports to the court, the court must hold a hearing to determine the defendant's competency. The court may grant additional time for good cause. The examined defendant and the State may introduce other evidence about the defendant's mental condition. If the examined defendant and the State stipulate in writing **or on the record**, the court may determine competence based solely on the experts' reports.

(b) Orders.

- (1) ***If Competent.*** If the court finds that the defendant is competent, the court must direct that proceedings continue without delay.
- (2) ***If Incompetent but Restorable.***
 - (A) ***Generally.*** If the court determines that the defendant is incompetent, it must order competency restoration treatment, unless there is clear and convincing evidence that defendant will not regain competence within 15 months.
 - (B) ***Extended Treatment.*** The court may extend treatment for 6 months beyond the 15-month limit if it finds that the defendant is making progress toward restoration of competence.
 - (C) ***Involuntary Treatment.*** The court must determine whether the defendant will be subject to treatment without consent.
 - (D) ***Treatment Order.*** A treatment order must specify:
 - (i) the place where treatment will occur;
 - (ii) whether the treatment is inpatient or outpatient under A.R.S. § 13-4512(A);

- (iii) the means of transportation to the treatment site;
- (iv) the length of treatment;
- (v) the means of transporting the defendant after treatment; and
- (vi) that the court is to be notified if the defendant regains competency before the expiration of the treatment order.

(E) *Modification.* The court may modify a treatment order at any time.

(3) ***Incompetent and Not Restorable.*** If the court determines that the defendant is incompetent and that there is no substantial probability that the defendant will become competent within 21 months, the court may on request of the examined defendant or the State:

- (A) remand the defendant to the Department of Health Services to begin civil commitment proceedings under A.R.S. §§ 36-501 et seq.;
- (B) order appointment of a guardian under A.R.S. §§ 14-5301 et seq.; or
- (C) release the defendant from custody and dismiss the charges without prejudice.

(c) Reports About Treatment.

(1) ***Generally.*** The court must order the treatment supervisor to submit a report to the court and to provide copies to [the State], defense counsel[,] and the clinical liaison. FLAG: [No later than 3 days after receiving the report, defense counsel must redact statements regarding the offense from the report and provide a copy to the State. The court may order that defense counsel provide an unredacted version of the report to the State.]

(2) ***When to Report.*** The treatment supervisor must submit a report:

- (A) for inpatient treatment, 120 days after the filing of the court's original treatment order and then every 180 days after the first report;
- (B) for outpatient treatment, every 60 days following the filing of the court's original treatment order;
- (C) when the treatment supervisor believes the defendant is competent to stand trial;
- (D) when the treatment supervisor concludes that the defendant will not be restored to competence within 21 months of the court's finding of incompetence; and
- (E) 14 days before the expiration of the court's last treatment order.

(3) Content of Report.

- (A) Generally.** The treatment supervisor's report must include at least the following:
- (i)** the treatment supervisor's name;
 - (ii)** a description of the nature, content, extent, and results of the supervisor's examination of the defendant and any tests the supervisor conducted;
 - (iii)** the facts on which the treatment supervisor's findings are based; and
 - (iv)** the treatment supervisor's opinion regarding the defendant's competence to understand the nature of the court proceedings against the defendant and to assist in his or her defense.
- (B) If Still Incompetent.** If the treatment supervisor finds the defendant is still incompetent, the report also must include:
- (i)** the nature of the mental illness, defect, or disability that is the cause of the incompetence;
 - (ii)** a prognosis regarding the defendant's restoration to competence and an estimate of how long it will take to restore the defendant's competence; and
 - (iii)** any recommendations for treatment modifications.
- (C) If Competent.** If the treatment supervisor finds the defendant has regained competence, the report also must include any limitations on the defendant's competence caused by medications used in the defendant's treatment.
- (d) Time Calculation.** When calculating time limits under A.R.S. § 13-4515(A), the court must consider only the time a defendant actually spends in a restoration to competency program.

COMMENT

No order made under this section is to be effective for longer than six months, thereby ensuring a frequent review of each defendant's status and progress.

Rule 11.6. Later Hearings

- (a) Grounds.** The court must hold a hearing to redetermine the defendant's competence:
- (1)** upon receiving a report from an authorized official of the institution in which a defendant is treated under Rule 11.5(b)(2) or (b)(3)(A) stating that, in the official's opinion, the defendant has become competent to stand trial;

- (2) upon a defendant's motion supported by the certificate of a mental health expert stating that, in the expert's opinion, the defendant is competent to stand trial;
- (3) at the expiration of the maximum period set by the court under Rule 11.5(b)(2);
or
- (4) if the court determines that it is appropriate to do so.

(b) Experts. The court may appoint new mental health experts under Rule 11.3.

(c) Finding of Competence. If the court finds that the defendant is competent, regular proceedings must commence again without delay. The defendant is entitled to repeat any proceeding if there are reasonable grounds to believe the defendant was prejudiced by previous incompetence.

(d) Finding of Continuing Incompetence. If the court finds that the defendant is still incompetent, it must proceed in accordance with Rules 11.5(b)(2) and (3). If, however, the court determines that there is a substantial probability that the defendant will regain competence in the foreseeable future, then the court may renew and may modify the treatment order for no more than an additional 180 days.

(e) Dismissal of Charges. At any time, the court may order the dismissal of the charges against a defendant adjudged incompetent, after providing notice and a hearing under A.R.S. § 13-4515(C). The defendant must be released from custody upon dismissal of the charges unless the court finds that the defendant's mental condition warrants a civil commitment hearing under A.R.S. §§ 36-501 et seq.

Rule 11.7. Privilege and Confidentiality

(a) Generally. Evidence obtained under Rule 11 is not admissible in a proceeding to determine guilt or innocence, unless the defendant presents evidence, either directly or through cross-examination, intended to rebut the presumption of sanity.

(b) Privileged Statements of the Defendant.

(1) ***Concerning the Charged Offense.*** Unless the defendant consents or the exception in (a) applies, no statement of a defendant obtained under Rule 11, or evidence resulting from such a statement, concerning the factual basis for the charged offense is admissible at the trial of the defendant's guilt or innocence, or at any later proceeding to determine guilt or innocence.

(2) ***Concerning Other Events or Transactions.*** Unless the defendant consents or the exception in (a) applies, no statement of a defendant obtained under Rule 11, or evidence resulting from such a statement, concerning any other event or

transaction is admissible at any later proceeding to determine the defendant's guilt or innocence.

(c) Confidentiality of Reports.

- (1) **Generally.** The court and counsel must treat reports of Rule 11 experts as confidential in all respects. They may, however, disclose other expert reports to mental health experts in proceedings related to A.R.S. §§ 13-4501, et seq. or as excluded in A.R.S. §§ 13-4508 and 13-4516.
- (2) **Sealing.** After the case is resolved or the court finds the defendant is unable to regain competence, the court must order the mental health expert reports sealed. By later order, the court may grant access to a report, but only for further competence or sanity evaluations, statistical study, or if necessary to assist in mental health treatment for restoration of competence or under A.R.S. § 13-502.

Rule 11.8. Examination of a Defendant's Mental Status at the Time of Offense

(a) Applicability. An examination under this rule may be requested separately from, or in addition to, an examination under Rule 11.2.

(b) Screening Report. On its own or on the motion of the defendant or the State [with the defendant's consent], the court may order an initial screening report to preliminarily investigate the defendant's mental status at the time of the offense.

(c) If the Defense Is Raised. If the defendant raises a defense under A.R.S. § 13-502 [and if the offense involves death or serious physical injury], a reasonable basis exists to support the plea, and the defendant consents, the court may, on its own or on motion of the defendant or the State, order that an appointed mental health expert provide a screening report. The report must include:

- (1) **Report Requirements.** Either the screening report under Rule 11.8(b) or the examination under Rule 11.8(c) must include the following:
 - (A) the defendant's mental status at the time of the offense; and
 - (B) if the expert determines that the defendant suffered from a mental disease, defect, or disability at the time of the offense, the relationship of the disease, defect, or disability to the alleged offense.

(d) Required Records. Within 3 days of the appointment of experts, the parties must provide the examining mental health expert with all of the defendant's available medical and criminal history records. The court may not appoint the expert until [the court receives notice that the records are ready for production to the expert.] Within 10 business days after the expert's appointment, the parties must provide the

appointed expert with any additional medical or criminal history records requested by the court or the appointed expert.

Rule 11.9. Capital Cases

Unless the defendant objects, the court in a capital case must order the defendant to undergo one or more mental health examinations required under A.R.S. §§ 13-753 and 13-754.

Rule 20. Judgment of Acquittal or Unproven Aggravator

(a) Before Verdict.

- (1) **Acquittal.** After the close of evidence on either side, and on motion or on its own, **if there is no substantial evidence to support a conviction** the court must enter a judgment of acquittal on any offense charged in an indictment, information, or complaint.
- (2) **Aggravation.** After the close of evidence on either side in an aggravation phase, and on motion or on its own, the court must enter a judgment that an aggravating circumstance or other sentence enhancement was not proven if there is no substantial evidence to support the allegation.
- (3) **Timing.** The court must rule on a defendant's motion with all possible speed. Until the motion is decided, the defendant is not required to proceed.

(b) After Verdict.

A defendant may renew a motion for judgment of acquittal or unproven aggravator or other sentence enhancement on any conviction or allegation within 10 days after any verdict is returned. (REVISIT AT NEXT TF MEETING, include comment)

Notwithstanding the absence of a motion before verdict, the court may order a judgment of acquittal or find an aggravator or other sentence enhancement not proven if there is no substantial evidence to support the verdict.

Rule 24. Post-Trial Motions

Rule 24.1. Motion for New Trial

- (a) **The Court's Authority.** After a verdict in any phase of trial, capital or noncapital, the court may order a new trial or phase of trial on the defendant's motion or **on the court's own initiative**, with the defendant's consent.
- (b) **Timeliness.** A party must file a motion for a new trial no later than 10 days after return of the verdict being challenged. This deadline is jurisdictional and the court may not extend it.
- (c) **Grounds.** The court may grant a new trial or phase of trial if:
- (1) the verdict is contrary to law or the weight of the evidence;
 - (2) the State is guilty of misconduct;
 - (3) one or more jurors committed misconduct by:
 - (A) receiving evidence not admitted during the trial or phase of trial;
 - (B) deciding the verdict by lot;
 - (C) perjuring himself or herself, or willfully failing to respond fully to a direct question posed during the voir dire examination;
 - (D) receiving a bribe or pledging his or her vote in any other way;
 - (E) **being** intoxicated during **trial proceedings** or **deliberations**; or
 - (F) conversing before the verdict with any interested party about the outcome of the case;
 - (4) the court erred in deciding a matter of law or in instructing the jury on a matter of law; or
 - (5) for any other reason, not due to the defendant's own fault, the defendant did not receive a fair and impartial trial or phase of trial.
- (d) **Admissibility of Juror Evidence to Impeach the Verdict.** If a verdict's validity is challenged under (c)(3), the court may receive the testimony or affidavit of any witness, including members of the jury, that relates to the conduct of a juror, a court official, or a third person. But the court may not receive testimony or an affidavit that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict.

(e) **Notice of Appeal.** A party may appeal an order granting or denying a motion under this rule by filing a separate notice of appeal. **[TAKE BACK TO TASK FORCE TO CLARIFY.]**

Rule 24.2. Motion to Vacate Judgment

(a) **Grounds.** The court must vacate a judgment if it finds that:

- (1) the court did not have jurisdiction;
- (2) newly discovered material facts exist satisfying the standards in Rule 32.1(e); or
- (3) the conviction was obtained in violation of the United States or Arizona Constitutions.

(b) **Time for Filing.** A party must file a motion under this rule no later than 60 days after the entry of judgment and sentence, but before the defendant's appeal, if any, is perfected under Rule 31.11. [Revisit this provision if WG-2 revises the concept of "perfection" of an appeal.]

(c) **Motion Filed After Notice of Appeal.** If a party files a motion to vacate judgment after a notice of appeal was filed, the superior court clerk must immediately send copies of the motion to the Attorney General and to the clerk of the appellate court in which the appeal was filed.

(d) **Appeal from a Decision on the Motion.** In noncapital cases, the party appealing a final decision on the motion must file a notice of appeal with the trial court clerk within 20 days after entry of the decision for superior court cases, or within 14 days after entry of the decision for limited jurisdiction court cases. In capital cases, if the court denies the motion, it must order the clerk to file a notice of appeal from that denial.

(e) **State's Motion to Vacate Judgment.** Notwithstanding (b), the State may move the court to vacate the judgment at any time after the entry of judgment and sentence if:

- (1) clear and convincing evidence exists establishing that the defendant was convicted of an offense that the defendant did not commit; or
- (2) the conviction was based on an erroneous application of the law.

COMMENT

Rules 24.2 and 24.3 are to replace Arizona Rules of Civil Procedure, Rule 60(c) with specifically criminal post-trial remedies of similarly broad scope. Arizona Rules of Civil Procedure, Rule 60(c) (Supp.1972) does not have any further application to criminal cases.

Rule 24.2(a). When a motion under Rule 24.2 has been filed but not decided at the time of perfection, both trial and appellate courts will have jurisdiction. If the trial court grants the Rule 24.2 motion the appeal may be mooted after the record for the appeal has been completed. The rules include the following mechanism to alleviate most confusion-- notice to the appellate court of the Rule 24.2 motion (Rules 31.2(f)(4) and 24.2(c)); the appellate court's power to stay the appeal pending determination of the Rule 24.2 motion (Rule 31.4(a)); and the direction in Rule 31.11 that, after perfection, all new matters be addressed to the appellate court.

Rule 24.2(c). Rule 24.2(c) is intended to **minimize** problems caused by concurrent jurisdiction in the trial and appellate courts. The section requires that notice be given only of Rule 24.2 motions brought after a notice of appeal has been filed.

Although Ariz.Rev.Stat. Ann. § 13-121 states as a jurisdictional requirement that notice of all proceedings brought in the trial court after judgment and sentence be sent to the attorney general, the requirement does not apply to motions filed within the ambit of the trial court's original trial jurisdiction.

Rule 24.3. Modification of Sentence

(a) Generally. Within 60 days of the entry of judgment and sentence but before the defendant's appeal is perfected, the court may correct any unlawful sentence or one imposed in an unlawful manner.

(b) Appeal.

(1) *Noncapital Cases.* In noncapital cases, the party appealing a final decision under Rule 24.3 must file a notice of appeal with the trial court clerk within 20 days after entry of the decision in superior court cases, or within 14 days after entry of the decision in limited jurisdiction court cases.

(2) *Capital Cases.* In capital cases, after denying modification of a sentence of death, the court must order the clerk to file a notice of appeal from the denial.

Rule 24.4. Clerical Error

The court on its own or on a party's motion may, at any time, correct clerical errors, omissions, and oversights in the record. **The court must notify the parties of any correction.**

Rule 26. Judgment, Presentence Report, Presentencing Hearing, Sentence

Rule 26.1. Definitions; Scope

- (a) **Determination of Guilt.** “Determination of guilt” means the court’s acceptance of a guilty or no contest plea or a guilty verdict by a jury or the court.
- (b) **Judgment.** “Judgment” means the court’s adjudication that the defendant is guilty or not guilty based on the jury’s or the court’s verdict, or the defendant’s plea.
- (c) **Sentence.** “Sentence” means the court’s pronouncement of the penalty imposed on the defendant after a judgment of guilty.
- (d) **Scope.** Rule 26 does not apply to minor traffic offenses. Rules 26.4, 26.5, 26.6, 26.7, 26.8, and 26.15 apply only to the superior court.

Rule 26.2. Time to Render Judgment

- (a) **Upon Acquittal.** If a defendant is found not guilty of any charge or any count of any charge, the court must immediately enter judgment pertaining to that count or charge.
- (b) **Upon Conviction.** Upon a determination of guilt on any charge or on any count of any charge, the court must enter judgment and either pronounce sentence pertaining to that count or charge or set a date for sentencing under Rule 26.3.
- (c) **Upon a Death Verdict.** Upon a death verdict, the court must immediately enter the judgment and sentence. The court must direct the clerk to send to the Department of Corrections the sentencing order and copies of all medical and mental health reports prepared for, or relating to, the defendant. (add exception to Rule 24.1?) [recommend substantive change re different time limits on appeal-cure in appellate rules]
- ~~(d) **Factual Determination.** If the court did not affirmatively make a finding of a factual basis for a plea under Rule 17.3, the court must make that determination before entering a judgment of guilt. The court may consider one or more of the following sources when finding a factual basis: the defendant’s statements; police reports; certified transcripts of grand jury proceedings; or other satisfactory information. [8/18 Refer rule to Workgroup #3 to see if the rule is needed (does this situation ever come up?). If deleted here, Rule 17.3 also would need to be deleted or changed. Other possibility is to move the rule to Rule 17.3.]~~

Rule 26.3. Sentencing Date and Time Extensions

(a) Sentencing Date.

- (1) *Superior Court.*

(A) *Generally.* Upon a determination of guilt, the court must set a date for **sentencing**.

(B) *Deadline for Sentencing.* The court must pronounce sentence no less than 15 nor more than 30 days after the determination of guilt unless the court, after informing the defendant of the right to a presentence report, grants the defendant's request that the court pronounce sentence earlier.

(C) *The Defendant's Presence or Absence.* When setting a sentencing date, the court must order the defendant to be present for sentencing and, if the defendant fails to appear, issue a warrant for the defendant's arrest. Additionally, following a conviction based on a trial, the court must notify the defendant that if the defendant's absence prevents the court from sentencing the defendant within 90 days after the determination of guilt, the defendant will lose the right to have an appellate court review the trial proceedings by direct appeal.

(2) *Limited Jurisdiction Courts.* A limited jurisdiction court may pronounce sentence immediately upon determining guilt unless the court orders, on its own or on a party's or a victim's request, that the court will pronounce sentence at a later date that is not more than 30 days after the determination of guilt.

(b) **Time Extension.** If a presentencing hearing is requested under Rule 26.7 or for good cause, the court may reset the sentencing date, but the new date should be no later than 60 days after the determination of guilt.

Rule 26.4. Presentence Report

(a) **When Required.** The court must order a presentence report in every case in which it has discretion over the penalty. However, a presentence report is optional if:

- (1) the defendant may only be sentenced to imprisonment for less than one year;
- (2) the court granted a request under Rule 26.3(a)(1); or
- (3) a presentence report concerning the defendant is already available.

(b) **When Prepared.** A presentence report may not be prepared until after the court makes a determination of guilt or the defendant enters a plea of guilty or no contest.

(c) **When Due.** Unless the court grants a request under Rule 26.3(a)(1) for an earlier sentencing, the presentence report must be delivered to the sentencing judge and to all counsel at least two days before the date set for sentencing.

(d) Inadmissibility. Neither a presentence report nor any statement made in connection with its preparation is admissible as evidence in any proceeding bearing on the issue of guilt.

Rule 26.5. Diagnostic Evaluation and Mental Health Examination

At any time before the court pronounces sentence, it may order the defendant to undergo a mental health examination or diagnostic evaluation. Unless the court orders otherwise, any report concerning such an examination or evaluation is due at the same time as the presentence report.

Rule 26.6. Court Disclosure of Reports Before Sentencing

(a) Disclosure to the Parties. The court must permit the State, defense counsel, and a self-represented defendant to review all presentence, diagnostic, and mental health reports concerning the defendant. If the court makes a portion of any report unavailable to one party, it must not make that portion available to any other party.

(b) Disclosure to a Victim. The court must permit the victim to review the presentence report after it makes the report available to the defendant, excluding any portions the court excises or that are confidential by law.

(c) Date of Disclosure. A report prepared under Rule 26.7(c) must be available to the parties no more than two days after it is delivered to the court and no less than two days before a presentencing hearing, unless the parties agree otherwise.

(d) Excision.

(1) Generally. The court may excise from copies of presentence, diagnostic and mental health reports disclosed to the parties:

(A) diagnostic opinions that might seriously disrupt a program of rehabilitation;

(B) sources of information obtained on a promise of confidentiality; and

(C) information that would disrupt an ongoing law enforcement investigation.

(2) Disclosure. The court must inform the parties if a portion of a report is not disclosed, and must state on the record its reasons for not disclosing it.

(e) Court Disclosure of Reports After Sentencing

(1) Disclosure to Personnel Responsible for the Defendant. After sentencing, the court must furnish to persons having direct responsibility for the defendant's custody, rehabilitation, treatment, or release all diagnostic, mental health, and presentence reports, except for portions excised under (d)(1)(B) and (C).

(2) **Disclosure to Courts.** The court must make an unexcised version of any report listed in (e)(1) available to:

(A) a reviewing court when a relevant issue has been raised; and

(B) a court sentencing the defendant after a later conviction.

(f) **Public Disclosure of Reports.** A report prepared under Rules 26.4, 26.5, or 26.7(c) is a public record unless the court orders otherwise or it is confidential by law.

Rule 26.7. Presentencing Hearing; Prehearing Conference

(a) **Request for a Presentencing Hearing.** If the court has discretion concerning the imposition of a penalty, it may—and, on any party’s request, must—hold a presentencing hearing before sentencing.

(b) Timing and Conduct of a Presentencing Hearing.

(1) **Timing.** The court may not hold a presentencing hearing until the parties have had an opportunity to review all reports concerning the defendant prepared under Rules 26.4 and 26.5.

(2) **Presenting Evidence.** At the hearing, any party may introduce any reliable, relevant evidence, including hearsay, to show aggravating or mitigating circumstances, to show why the court should not impose a particular sentence, or to correct or amplify the presentence, diagnostic, or mental health reports.

(3) **Record.** A presentencing hearing must be held in open court, and the court must make a complete record of the proceedings.

(c) Prehearing Conference.

(1) **Generally.** On motion or on its own, the court may hold a prehearing conference to determine what matters are in dispute, and to limit or otherwise expedite a presentencing hearing.

(2) **Attendance of Probation Officer.** The court may order the probation officer who prepared the presentence report to attend a prehearing conference.

(3) **Postponing Sentencing and Presentencing Hearing.** At the conference, the court may postpone the date of sentencing for no more than 10 days beyond the maximum extension permitted by Rule 26.3(b), and may delay the presentencing hearing accordingly, to allow the probation officer to investigate any matter the court specifies, or to refer the defendant for mental health examinations or diagnostic tests.

Rule 26.8. The State's Disclosure Duty; Objections and Corrections to a Presentence Report

- (a) **The State's Disclosure Duty.** The State must disclose any information in its possession or control it has not already disclosed that would tend to reduce the defendant's punishment.
- (b) **Notice of Objections.** At least one day before the presentencing hearing, each party must notify the court and other parties of the party's objections, if any, to the contents of any report prepared under Rules 26.4, 26.5 or 26.7(c).
- (c) **Corrections to a Presentence Report.** If the court sustains any objection to a presentence report's contents, it may take appropriate action, including but not limited to:
- (1) excising portions of the report, including any objectionable language;
 - (2) ordering a new presentence report to be prepared with specific instructions and directions;
 - (3) directing that a different probation officer prepare a new presentence report; or
 - (4) ordering the presentence report sealed.

Rule 26.9. The Defendant's Presence

The defendant has a right to be present at a presentencing hearing and must be present at sentencing.

Rule 26.10. Pronouncing Judgment and Sentence

- (a) **Pronouncing Judgment.** In pronouncing judgment on any noncapital count, the court must indicate whether the defendant's conviction is pursuant to a plea or trial, the offense for which the defendant was convicted, and whether the offense falls in the categories of dangerous, non-dangerous, repetitive, or non-repetitive offenses.
- (b) **Pronouncing Sentence.** When the court pronounces sentence, it must:
- (1) give the defendant an opportunity to address the court;
 - (2) state that it has considered the time the defendant has spent in custody on the present charge;
 - (3) explain to the defendant the terms of the sentence or probation;
 - (4) specify the beginning date for the term of imprisonment and the amount of time to be credited against the sentence as required by law;

- (5) for any felony offense or a violation of A.R.S. §§ 13-1802, 12-1805, 28-1381, or 28-1382, permanently affix the defendant's right index fingerprint to the sentencing document or order; and
- (6) if the court sentences the defendant to a prison term, direct the clerk to send to the Department of Corrections, along with the sentencing order, copies of all presentence reports, probation violation reports, and medical and mental health reports prepared for, or relating to, the defendant.

Rule 26.11. A Court's Duty After Pronouncing Sentence

(a) Disclosures. After pronouncing judgment and sentence, the court must:

- (1) inform the defendant:
 - (A) of the right to appeal the judgment, sentence, or both;
 - (B) of the right to seek post-conviction relief; and
 - (C) the failure to file a timely notice of appeal or timely notice of post-conviction relief will result in the loss of those rights;
- (2) advise that:
 - (A) if the defendant is indigent, as defined in Rule 6.4(a), the court will appoint counsel to represent the defendant on appeal; and
 - (B) if the defendant is unable to pay for certified copies of the record on appeal and a certified transcript, the county will provide them; and
- (3) advise the defendant of the right to waive the right to appellate counsel by filing a written notice no later than 30 days after filing the notice of appeal.

(b) Written Notice. ~~After making the disclosures in (a),~~ The court must provide the defendant with a written notice of the rights set forth in (a) and the procedures the defendant must follow to exercise them. The record must show affirmatively the defendant's receipt of the notice.

COMMENT

The defendant's trial counsel has a duty under Rule 6.3(b) to advise the client whether or not an appeal would be beneficial and to continue representing the defendant if an appeal is taken, unless counsel shows good cause why counsel should be allowed to withdraw. Form 23 should be used to notify the defendant of the rights to appeal and to counsel on appeal.

In non-record courts, the defendant will be informed of the right to *de novo* appeal under Rule 30, and the right to counsel, if any, under Rule 6.1(b).

Rule 26.12. Defendant's Compliance with Monetary Terms of a Sentence

(a) Method of Payment—Installments. The court may permit the defendant to pay any fine, restitution, or other monetary obligation within a specified period of time or in specified installments. The defendant must pay restitution as promptly as possible, given the defendant's ability to pay.

(b) Method of Payment—to Whom. The defendant must pay a fine, restitution, or other monetary obligations to the court, unless the court orders otherwise. The court must apply defendant's payments first to satisfy the restitution order and the payment of any restitution in arrears. The court must forward restitution payments to the victim as promptly as practicable.

(c) Failure to Pay a Monetary Obligation.

(1) *Defendants Not on Supervised Probation.* If a defendant who is not on supervised probation fails to pay a fine, restitution, or other monetary obligation, the court must promptly notify the State.

(2) *Defendants on Supervised Probation.* If a defendant who is on supervised probation fails to pay a fine, restitution, or other monetary obligation, the court must promptly notify the defendant's probation officer.

(3) *Court Action upon Failure of Defendant to Pay a Fine, Restitution, or Other Monetary Obligation or to Comply with Court Orders.* If the defendant fails to timely pay a fine, restitution, or other monetary obligation, the court may issue an arrest warrant or a summons and require the defendant to show cause why he or she should not be held in contempt for nonpayment.

Rule 26.13. Consecutive Sentences

If the court imposes separate sentences of imprisonment on a defendant for two or more offenses, the sentences run consecutively unless the judge expressly directs otherwise ~~or unless consecutive sentences would be illegal~~. This rule applies even if the offenses are not charged in the same indictment or information. **There is no presumption for consecutive sentences.**

Rule 26.14. Resentencing

If a judgment or sentence, or both, have been set aside—either on appeal, by collateral attack, or on a post-trial motion—the court may not impose a sentence for the same

offense, or a different offense based on the same conduct, which is more severe than the earlier sentence unless the court determines:

- (a) the earlier sentence is no longer appropriate based on evidence about the defendant's conduct occurring after the court pronounced the earlier sentence;
- (b) the earlier sentence was unlawful and it is corrected so the court may impose a lawful sentence; or
- (c) other circumstances exist and there is no reasonable likelihood that an increase in the sentence is the product of actual vindictiveness by the sentencing judge.

Rule 26.15. Special Procedures upon Imposing a Death Sentence

After imposing a sentence of death, the court must order the clerk to file a notice of appeal from the judgment and sentence.

Rule 26.16. Entry of Judgment and Sentence; Warrant of Authority to Execute Sentence

(a) **Entry of Judgment and Sentence.** The judgment of conviction and sentencing on the judgment are complete and valid at the time the court orally pronounces them in open court.

(b) **Warrant of Authority.**

- (1) *Entry of Judgment and Sentence.* The court must enter the exact terms of the judgment and sentence in the court's minutes.
- (2) *Notice to Appropriate Officer.* The court must furnish a certified copy of the minute entry, signed by the sentencing judge, to the appropriate officer and no other authority is necessary to execute any sentence the court imposes. If the sentence is for death or imprisonment, the appropriate officer must receive the defendant for execution of the sentence upon delivery to him or her of a signed, certified copy of the minute entry in the court's docket.

Rule 27. Probation and Probation Revocation

Rule 27.1. Terms and Conditions of Probation

The sentencing court may impose terms and conditions on a probationer that promote the probationer's rehabilitation. The probation officer or any other person the court designates also may impose regulations on the probationer that are necessary to implement the court's terms and conditions and that are consistent with them. The court and probation officer must give the probationer a written copy of the terms, conditions, and regulations.

COMMENT

Justice courts are not provided state probation services, all references to and notice requirements for probation officers should be disregarded in the justice court context.

Rule 27.2. Intercounty Transfers

(a) Definitions.

- (1) *Courtesy Transfer.*
- (2) *Transfer of Probation Jurisdiction.*

(b) Courtesy Transfer of Probation Supervision.

- (1) *Generally.* The superior court or its adult probation department in a county (the "sending county") may authorize a probationer to reside in another county (the "receiving county") if it verifies that the receiving county:
 - (A) accepts the probationer; and
 - (B) can supervise the probationer in accordance with the terms and conditions of the individual's probation.
- (2) *Amending Terms and Conditions.* If the receiving county is unable to ensure it can supervise the probationer in accordance with the terms and conditions of probation, the court in the sending county, after a hearing, may amend the terms and conditions to permit the transfer.
- (3) *Retention of Jurisdiction.* The court in the sending county retains jurisdiction over the probationer and any probation violation proceeding, and remains responsible for the collection of the probationer's monetary obligations.

(c) Transfer of Probation Jurisdiction.

- (1) *Authorizing Transfer.*

- (A) *Generally.* The superior court in a county (the “sending county”) may order the transfer of jurisdiction over a probationer’s case to another Arizona county (the “receiving county”) upon agreement of the original prosecuting agency, the probationer, the sending and receiving county probation departments, and the superior court in the receiving county.
- (B) *Victim’s Rights.* A victim of the offense, may request an opportunity to be heard concerning a transfer. The court in the sending county must give the victim notice of a proposed transfer and any hearing.
- (2) ***Transmitting Court Records.*** Within 20 days after the transfer order is filed, the clerk in the sending county must certify the probationer’s financial obligations in the case and forward the court’s file and entire record, together with a transmittal letter, to the clerk in the receiving county. The clerk may transmit these records in either electronic or paper format. The entire record must include all exhibits, unless they were discarded under Rule 28. Upon receipt, the clerk in the receiving county must sign the transmittal letter and return it to the clerk in the sending county.
- (3) ***Transmitting Probation Records and Transferring Probationary Jurisdiction.*** The county probation department transferring jurisdiction over a probationer must send copies of the file and any other pertinent information to the chief probation officer in the receiving county. The transfer is deemed complete when the chief probation officer in the receiving county receives the file and the probationer checks in with the new probation officer. Until the transfer is complete, the sending county probation department retains jurisdiction over the probationer.
- (4) ***Assuming Jurisdiction in the Receiving County.*** Upon filing an order approving the transfer, the superior court in the receiving county assumes jurisdiction over the probationer’s case and has all powers of the sentencing court, including the power to restore civil rights. The chief probation officer may request the court in the receiving county to conduct a review hearing to affirm or modify the terms and conditions of supervision, including the payment of fees and restitution.
- (5) ***Monetary Obligations.*** The court in the receiving county is responsible for collecting the probationer’s monetary obligations. The receiving county must disperse to the sending county any money it collects for fees, costs or expenses that the probationer owes to the sending county.

- (6) **Remand of the Case.** If there is a remand of probationer's case for a new trial, the receiving court must transfer the case back to the sending county. In all other remands, the receiving county may do one of the following:
- (A) retain jurisdiction;
 - (B) transfer the case in its entirety back to the sending county; or
 - (C) transfer the case back to the sending county and retain jurisdiction only over probation supervision and revocation.
- (7) **Transmitting Court Records After a Remand for New Trial.** Within 20 days after an order is filed remanding a transferred case for a new trial, the clerk in the receiving county must return the court file and entire record, including exhibits, and send a transmittal letter to the clerk of the sending county. The clerk may transmit the file and record in either electronic or paper format. Upon receipt, the clerk in the sending county must sign the transmittal letter and return it to the clerk of the receiving county.
- (8) **Transmitting Probation Records After a Remand for New Trial.** Upon entry of an order remanding a case for a new trial, the receiving county's probation department must send a copy of its file and any other pertinent information to the chief probation officer in the sending county.

Rule 27.3. Modification of Conditions

- (a) **By a Probation Officer.** A probation officer or any other person the court designates may modify or clarify any regulation imposed.
- (b) **By the Court.**
- (1) **Generally.** After giving notice to the State, the probationer, and a victim who has the right to notice under Rule 27.11, the court may modify or clarify any term, condition, or regulation of probation. The court's authority to modify probation must comply with due process, statutory limitations, or party agreement.
 - (2) **Who May Request Modification or Clarification.** At any time before the probationer's absolute discharge, a probationer, probation officer, the State, or any other person the court designates, may ask the court to modify or clarify any condition or regulation.
 - (3) **Restitution.** At any time before the probationer's absolute discharge, persons entitled to restitution under a court order may ask the court, based on changed circumstances, to modify or clarify the manner in which restitution is paid.

(4) **Hearing.** The court may hold a hearing on any request for modification or clarification under (b)(2) or (b)(3).

(c) **Written Copy and Effect.** The probationer must be given a written copy of any modification or clarification of a term, condition, or regulation of probation. A modification or clarification may go into effect before it is put in writing, but its violation may not be a basis for revoking probation unless it is in writing and the probationer received a copy.

COMMENT

This provision is included to protect the probationer from arbitrary conditions or regulations, to provide a formal means short of violation and revocation proceedings for the probationer to have ambiguous conditions or regulations clarified, to provide added flexibility to the probation process. Although a trial court has the authority to modify probation, the court's authority must comply with due process consideration, and may be limited by statute or the parties' agreement. *See, e.g.,* A.R.S. §§ 13-901 – 903; *State v. Rutherford*, 154 Ariz. 486, 744 P.2d 13 (App.1987).

Rule 27.4. Early Termination of Probation

(a) **Discretionary Probation Termination.** At any time during the term of probation, the court, may terminate probation and discharge the probationer absolutely as provided by law. The court may take such action on the probation officer's motion or on its own, but only after any required notice to the victim of the offense and notice to the State.

(b) **Earned Time Credit Probation Termination.** The court may reduce the term of supervised probation for earned time credit as provided by law.

Rule 27.5. Order and Notice of Discharge

Upon expiration or early termination of probation, the superior court must order the probationer's absolute discharge. Upon expiration or early termination of probation imposed by a limited jurisdiction court, the probationer is discharged absolutely. Upon the probationer's request, the court must furnish the probationer with a certified copy of the discharge order in superior court and of the early termination order in a limited jurisdiction court.

Rule 27.6. Petition to Revoke Probation and Securing the Probationer's Presence

The probation officer or the State may petition the court to revoke probation if there is reasonable cause to believe that a probationer has violated a written term, condition, or regulation of probation. After a petition to revoke is filed, the court may issue a summons

directing the probationer to appear on a specified date for a revocation hearing, or it may issue a warrant for the probationer's arrest.

Rule 27.7. Initial Appearance After Arrest

- (a) **Probationer Arrested.** If a probationer is arrested on a warrant issued under Rule 27.6(b) or is arrested by the probationer's probation officer under A.R.S. § 13-901(D), the probationer must be taken without unreasonable delay to the court with jurisdiction over the probationer.
- (b) **Notice.** If a probationer is arrested on a warrant issued under Rule 27.6(b), the court must immediately notify the probationer's probation officer of the initial appearance.
- (c) **Procedure.** At the initial appearance, the court must advise the probationer of the probationer's right to counsel under Rule 6, inform the probationer that any statement the probationer makes before the hearing may be used against the probationer, set the date of the revocation arraignment, and make a release determination under Rule 7.2(c).

Rule 27.8. Probation Revocation

(a) Revocation Arraignment.

- (1) **Timing.** The court must hold a revocation arraignment no more than 7 days after the summons is served or after the probationer's initial appearance under Rule 27.7.
- (2) **Conduct of the Proceeding.** The court must inform the probationer of each alleged probation violation, and the probationer must admit or deny each allegation.
- (3) **Setting a Violation Hearing.** If the probationer does not admit to a violation or if the court does not accept an admission, the court must set a violation hearing, unless both parties agree that a violation hearing may proceed immediately after the arraignment.

(b) Violation Hearing.

- (1) **Timing.** The court must hold a hearing to determine whether a probationer has violated a written term, condition, or regulation of probation no less than 7 and no more than 20 days after the revocation arraignment, unless the probationer in writing or on the record in open court requests, and the court agrees, to set the hearing for another date.
- (2) **Probationer's Right to Be Present.** The probationer must be present at the violation hearing.

(3) **Conduct of the Hearing.** A violation must be established by a preponderance of the evidence. Each party may present evidence and has the right to cross-examine any witness who testifies. The court may receive any reliable evidence, including hearsay, that is not legally privileged.

(4) **Findings and Setting a Disposition Hearing.** If the court finds that the probationer committed a violation of a term, condition, or regulation of probation, it must make specific findings of the facts that establish the violation and then set a disposition hearing.

(c) Disposition Hearing.

(1) **Timing.** The court must hold a disposition hearing no less than 7 nor more than 20 days after making a determination that the probationer has violated a term, condition, or regulation of probation.

(2) **Disposition.** Upon finding that the probationer violated a term, condition, or regulation of probation, the court may revoke, modify, or continue probation. If the court revokes probation, the court must pronounce sentence in accordance with Rules 26.10 through 26.16. The court may not revoke probation for violation of a term, condition, or regulation if the probationer did not receive a written copy of the term, condition or regulation.

(d) Waiver of Disposition Hearing. If a probationer admits, or the court finds, a violation of a term, condition, or regulation of probation, the probationer may waive a disposition hearing. If the court accepts the waiver, it may proceed immediately to a disposition under (c)(2).

(e) Disposition upon Determination of Guilt for a Later Offense. If a court with jurisdiction over the probationer makes a determination of guilt under Rule 26.1(a), that the probationer committed a criminal offense, the court need not hold a violation hearing and may set the matter for a disposition hearing at the time set for entry of judgment on the criminal offense.

(f) Record. The court must make a record of the revocation arraignment, violation hearing, and disposition hearing.

Rule 27.9. Admissions by the Probationer

(a) Required Inquiries. Before accepting a probationer's admission that he or she violated a term, condition, or regulation of probation, the court must address the probationer personally and determine that probationer understands:

(1) the nature of the violation of probation to which the probationer will be admitting;

- (2) the right to counsel, if the probationer is not already represented by counsel;
- (3) the right to cross-examine witnesses who may testify against the probationer;
- (4) the right to present witnesses on the probationer's behalf;
- (5) that by admitting a violation of a condition or regulation of probation, the probationer waives the right for appellate court review by direct appeal, and may seek review only by filing a petition for post-conviction relief under Rule 32 and, if denied, by filing a petition for review; and
- (6) regardless of the outcome of the probation violation proceeding, if the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer may still be tried for that offense, and any statement made by the probationer at the probation violation proceeding may be used to impeach his or her testimony at the trial of that other offense.

(b) Required Determinations. The court may accept the probationer's admission only if it determines that:

- (1) the probationer wishes to forego the rights in (a);
- (2) the admission is voluntary and not the result of force, threats or promises; and
- (3) the admission has a factual basis.

Rule 27.10. Revocation of Probation in Absentia

(a) Petition.

- (1) **Generally.** If the supervising probation officer has reasonable cause to believe that a probationer has violated a written term, condition, or regulation of probation, the probation officer or the State may petition the court to revoke probation in absentia.
- (2) **Timing.** A petition to revoke probation in absentia may be filed only after the probationer's whereabouts are unknown to the probation officer for at least 60 days.
- (3) **Contents.** The petition must be verified and include:
 - (A) each violation of the terms, conditions, and regulations of probation;
 - (B) an allegation that the whereabouts of the probationer are unknown;
 - (C) efforts made to locate the probationer; and
 - (D) the probationer's last known address.

(b) Order to Show Cause. If the court finds that the petition is proper, it must issue an order directing the probationer to appear at a specified date and time, not less than 10 nor more than 60 days, to show cause why the court should not revoke probation.

(c) Service of Process. The probationer must be served with the order to show cause under Rule 3.4.

(d) Hearing.

(1) *If the Probationer Appears.* If the probationer appears at the time set for hearing, the court may proceed under Rules 27.8 and 27.9.

(2) *If the Probationer Does Not Appear.* If the probationer fails to appear at the time set for the hearing and the court is satisfied that reasonable efforts have been made to give the probationer notice, it may:

(A) hear evidence in support of each allegation of violation;

(B) make specific findings of each violation; and

(C) revoke probation.

(e) Record. The court must make a record of all proceedings at the revocation hearing in absentia.

Rule 27.11. Victims' Rights in Probation Proceedings

The court must afford the victim, as defined by Rule 39, the opportunity to be present and to be heard at any proceeding involving:

(a) the termination of probation or intensive probation;

(b) probation revocation dispositions;

(c) a modification of probation or intensive probation terms that would substantially affect the probationer's contact with, or safety of, the victim or that would affect restitution or incarceration status; or

(d) transfers of probation jurisdiction.

Rule 27.12. Probation Review Hearing Regarding Sex Offender Registration

(a) Right to Hearing. The court must conduct a probation review hearing at least once a year if requested by a probationer who is:

(1) under 22 years of age; and

(2) serving a term of probation for an offense that:

- (A) requires registration under A.R.S. § 13-3821; and
 - (B) was committed when the probationer was under 18 years of age.
- (b) **Notice of Right to Hearing.** The court must inform a probationer of the right to a hearing under (a) when it imposes probation.
- (c) **Request for Hearing and Timing.** To obtain a hearing, the probationer must file a request with the court and provide a copy of the request to the State. A probationer must file a request for a hearing no later than 30 days before the probationer's twenty-second birthday.
- (d) **Setting a Hearing and Providing Notice.**
- (1) **Timing.** If the request is timely, the court must hold a hearing within 30 days after the request is filed.
 - (2) **Notice.**
 - (A) **Generally.** The court must notify the following of the hearing date:
 - (i) the State, which in turn must notify any victim or victim's attorney entitled to be present and heard under the Arizona Constitution, statute, or court rule;
 - (ii) the probationer's attorney, if any; and
 - (iii) the probation officer supervising the probationer.
 - (B) **Notice to the State.** In any case involving a victim, the court must give the State at least 7 calendar days' notice of the hearing date.
- (e) **Prehearing Conference.** The court may hold a prehearing conference. The people who may be present and the conference's scope are specified by statute.
- (f) **Probation Review Report.** The court must require the preparation of a probation review report before a probation review hearing. The probation office must deliver the report to the judge conducting the hearing at least 7 calendar days before the scheduled hearing date.
- (g) **Scope of Hearing.** At the hearing, the court must consider and decide whether to:
- (1) continue, modify, or terminate probation;
 - (2) continue to require, suspend, or terminate the probationer's registration under A.R.S. § 13-3821; and
 - (3) continue, defer, or terminate community notification under A.R.S. § 13-3825.

Rule 28. Retention and Destruction of Records and Evidence

Rule 28.1. Duties of the Clerk

(a) Retention of Records and Evidence. The clerk receives and maintains all court filings, and all evidence admitted, in criminal cases.

(b) Destruction of Certain Records.

(1) **Generally.** When a case is no longer subject to modification, the clerk must destroy certain records under retention and destruction schedules established by the Supreme Court.

(2) **Definition.** A case is ~~not~~ no longer “subject to modification”:

- (i) after the defendant is acquitted or the court dismisses with prejudice the charges against the defendant;
- (ii) 60 days after the entry of judgment and sentence, unless a party files a notice of appeal or a post-trial motion;
- (iii) 90 days after either a court denies a post-trial motion or receives an appellate court mandate affirming the defendant’s conviction, unless a petition for writ of certiorari is filed with the United States Supreme Court;
- (iv) 25 days after the United States Supreme Court denies certiorari or issues a mandate affirming a conviction, unless a petition for rehearing is filed;
- (v) after ~~receiving an order of~~ the United States Supreme Court ~~denying~~ denies a petition for rehearing; or
- (vi) one year after exhausting all state remedies if the defendant did not file a petition for habeas corpus, or after exhausting all federal remedies if the defendant filed a petition for a writ of habeas corpus.

~~(3) **In Counties with Electronic File Retention.** In counties that maintain an electronic court record authorized by the Administrative Office of the Courts, the clerk may destroy the paper original of a document in a criminal case if it is scanned and then retained electronically. All such records must be maintained in a manner that reasonably assures that they will be preserved permanently. Unless filed under seal, all electronically retained records must be available for public inspection.~~

~~(4) **In Counties Without Electronic File Retention.**~~

~~(A) *Generally.* In counties that do not maintain an electronic court record authorized by the Administrative Office of the Courts, the clerk may destroy originals of documents in any criminal case if the particular case is no longer subject to modification, as defined in (b)(2)(B). Before a document is destroyed, the clerk must create a photographic or electronic reproduction or image of the original document. All such reproductions and images must be retained and maintained in a place and manner that reasonably assures that they will be preserved permanently. Unless filed under seal, all such records must be available for public inspection.~~

~~(c) **Court Reporter Notes.** Court reporters must retain their notes in criminal cases according to records under retention and disposition destruction schedules established by the Supreme Court and purge lists as provided in Code of Judicial Administration § 3-402(D)(38).~~

~~(d) **Appellate Court Records.** Regardless of other requirements of law, an appellate clerk may destroy any parts of the appellate record after the time set forth in (b) if the trial court also has a copy of those parts. **[Alternative in light of AO:** An appellate clerk may destroy the paper original of any document in the appellate record if it is scanned and then retained electronically. Otherwise, the appellate clerk may destroy any document in the appellate record if the superior court clerk [trial court clerk?] is required to retain the original or a copy of that document.]~~

COMMENT

~~**Rules 28.1(a) and (b).** This rule defines the duties of the superior court clerk and provides him some guidance in applying the terms of Ariz.Rev.Stat. Ann. § 11-552(Supp.1972) [renumbered as § 12-282] authorizing destruction of original court records when microfilm copies are made and retained. As amended, the statute requires that “the records of the clerk do not show that the action or proceeding is pending, subject to modification, or on appeal in any court.” The existence of Rule 32, which leaves criminal cases “subject to modification” indefinitely, requires that the destruction statute be implemented by rule if it is to be useful to the clerks in dealing with the paper explosion. Section (b) therefore limits the applicability of the statutory language to post-trial motions and appeals under Rules 24 and 31. Petitions for delayed appeal or other post-conviction relief under Rule 32 will have to be decided on the basis of microfilmed records.~~

~~**Rule 28.1(c).** Rule 28.1(c) specifically excepts the original notes of the court reporter from the reach of this rule and Ariz.Rev.Stat. Ann. § 11-552 (Supp.1972) [renumbered as § 12-282].~~

Rule 28.2. Disposition of Evidence in the Custody of Prosecuting Agencies or Law Enforcement Agencies.

(a) Discretionary Disposition. Unless otherwise prescribed by law, prosecuting agencies and law enforcement agencies may, at any time, dispose of any item, or any part or portion of an item, that they seized or otherwise obtained for use in a criminal prosecution, ~~in accordance with the procedures established by law and by this rule.~~

(b) Mandatory Disposition. Unless otherwise prescribed by law, prosecuting agencies and law enforcement agencies must dispose of items within 30 days after the case of each person against whom the items could be used as evidence is no longer “subject to modification” under Rule 28.1(b)(2)~~(b)(2)(B).~~] **NOTE: CONSTITUTIONALITY CONCERNS?**

(c) Manner of Disposition. An item must be returned for disposition to the prosecuting agency or the law enforcement agency that seized or acquired it. If private possession of the item is not illegal or ~~otherwise prescribed~~ prohibited by law, the agency must return it to the legal owner unless the owner’s whereabouts are unknown, or the owner is unwilling to accept it. If it is not possible to return an item, the agency must sell or otherwise dispose of the item in the manner prescribed by law.

(d) Notice to the Prosecuting Agency and the Attorney General; Right to Examine and Record of Disposal.

(1) Notice and Right to Examine. Before disposing any item or part of an item under (a) or (b), a law enforcement agency must notify the responsible prosecuting agency and the Attorney General, who may:

(A) photograph, reproduce, preserve in whole or in part, or identify the item;

(B) transcribe all serial numbers, identification numbers, or other identifying markings; or

(C) prepare, or have an expert prepare, a report identifying the item.

(2) Record of Disposal. The prosecuting agency or the Attorney General may prepare a record of disposal identifying an item examined under (d)(1). The person preparing the record must certify it.

(e) Notice of Disposal to the Affected Person; Right to Examine and Record of Disposal.

(1) Notice. At least 10 [40] days before disposing an item under this rule, the prosecuting agency or law enforcement agency must serve a notice of disposal, together with a copy of any record of disposal made under (d)(2) to any person

and the person's counsel against whom the State has used or may use the item as evidence.

- (2) **Examination.** Within 10 [30] days after the disposal notice is served, the person may request a stay of disposal until after trial or may request permission to examine, test, analyze, or otherwise make his or her own record of disposal of the item. The person preparing the record of disposal must certify it.
- (3) **Conditions.** The State must comply with a request made under (e)(2), but may impose reasonable conditions on any examination, testing or analysis, including a stipulation concerning chain of title.
- (4) **Record of Disposal.** The law enforcement agency may prepare a record of disposal identifying an item examined under (e)(2). The person preparing the record must certify it.

(f) Stay of Disposal. On any party's request or on its own, the court with jurisdiction over the case may stay disposal of any item for a reasonable time.

(g) Use of Record of Disposal. A record of disposal that is made under (d)(2) or (e)(2) is admissible at a later court proceeding for any purpose for which the item itself would be admissible.

~~The rule supplements Ariz.Rev.Stat. Ann. §§ 13-439 (Supp.1972) [now § 13-3306] (seizure and destruction of gambling devices), 13-533 (1956) [now § 13-3503] (seizure and destruction of obscene materials), 13-914 (1956) [now §§ 13-3105 and 13-4301 et seq.] (disposal of weapons), 36-1014 (1956) [now §§ 13-4301 et seq. and 36-2541] (seizure and disposal of narcotic drugs), and 36-1041 through 36-1046 (1956 and Supp.1972) [repealed; now § 13-4301 et seq.] (seizure and disposition of motor vehicles used in narcotics violations).~~

~~**Rules 28.2(c) and (d).** Section (c) places the responsibility for disposing of an item upon the acquiring agency.~~

~~Items are to be returned to the legal owner unless the item is automatically forfeited by law or the owner cannot be found or determined. If return is not possible the item is to be sold or disposed of according to law.~~

Rule 28.3. Retroactive Application

The provisions of this rule shall apply to all records and evidence in the possession of the clerk, and prosecuting agency and law enforcement agency as of the effective date of these rules regardless of the date on which the records were made or the evidence obtained.

Rule 32. Post-Conviction Relief [~~per JJ Cattani and Myers, need to add a date for the retrial after a Rule 32 is granted. Add this to Rule 8(e)?~~]

Rule 32.1. Scope of Remedy

Petition for Relief. Subject to Rule[s] 32.2 [and 32.4(a)(2)], a defendant convicted of, or sentenced for, a criminal offense may file a notice of post-conviction relief, without paying any fee, to request appropriate relief under this rule.

“Of-Right” Petition. A defendant who pled guilty or no contest, or who admitted a probation violation, or who had an automatic probation violation based on a plea of guilty or no contest, may file an “of-right” notice of post-conviction relief. After the court’s final order or mandate in a Rule 32 of-right proceeding, the defendant also may file an “of-right” notice challenging the effectiveness of Rule 32 counsel in the first of-right proceeding.

Grounds for Relief. Grounds for relief are:

- (a) the defendant’s conviction was obtained or the sentence was imposed in violation of the United States or State of Arizona constitution;
- (b) the court did not have jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) the sentence imposed exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
- (d) the defendant continues to be in custody after his or her sentence expired;
- (e) newly discovered material facts, as defined below, probably exist and those facts probably would have changed the verdict or sentence.

Newly discovered material facts exist if:

- (1) the facts were discovered after the trial or sentencing;
 - (2) the defendant exercised due diligence in discovering these facts; and
 - (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of critical significance such that the evidence probably would have changed the verdict or sentence.
- (f) the failure to file a notice of post-conviction relief of-right or a notice of appeal within the required time was not the defendant’s fault;

- (g) there has been a significant change in the law that, if applied to the defendant's case, would probably overturn the defendant's conviction or sentence; or
- (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.

COMMENT

Rule 32.1(a). Most traditional collateral attacks are encompassed within paragraph (a). Claims of denial of counsel, of incompetency of counsel, and of violation of other rights based on the federal or Arizona constitution are included.

Rule 32.1(b). Paragraph (b) retains the basic attack on jurisdiction universally recognized as a ground for collateral attack.

Rule 32.1(c). This provision is intended to allow an attack on a sentence even though the petitioner does not contest the validity of the underlying conviction.

Rule 32.1(d). This paragraph is not intended to include attacks on the conditions of imprisonment or on correctional practices or prison rules. Paragraph (d) is intended to include claims of more traditional types—*e.g.*, miscalculation of sentence, questions of computation of good time—which result in the defendant's remaining in custody when he should be free. Appeals from the conviction and imposition of probation must be filed within 20 days of the entry of judgment and sentence. See Rules 31.3, 26.1(b) and 26.16(a).

Rule 32.1(f). This provision includes the situation in which the defendant fails to appeal because the trial court, despite the requirements of Rule 26.11, did not advise him of his appeal rights, and the situation in which the defendant intended to appeal and though timely appeal had been filed by his attorney when in reality it had not.

Rule 32.1(h). This claim is independent of a claim under subparagraph (e). A defendant who establishes a claim of newly discovered evidence does not need to comply with the requirements of subparagraph (h).

Rule 32.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 32 based on any ground:

- (1) still raisable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;

(2) finally adjudicated on the merits in an appeal or in any previous collateral proceeding; or

(3) waived at trial, on appeal, or in any previous collateral proceeding.

(b) Exceptions. Rule 32.2(a) does not apply to claims for relief based on Rule 32.1(d) through (h). A claim under Rule 32.1(d) through (h) that defendant raises in a successive or untimely post-conviction notice must include the specific exception and explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not identify a specific exception or provide reasons why defendant did not raise the claim in a previous petition or in a timely manner, the court may summarily dismiss the notice.

(c) Standard of Proof. The State must plead and must 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.

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

(a) Generally. A post-conviction proceeding is part of the original criminal action and is not a separate action. It displaces and incorporates all trial court post-trial remedies except those obtainable by post-trial motions and habeas corpus.

(b) Habeas Corpus. If a court having jurisdiction over a defendant's person receives an application for a writ of habeas corpus raising any claim that attacks the validity of the defendant's conviction or sentence, and if that court is not the court that convicted or sentenced the defendant, it must transfer the application to the court where the defendant was convicted or sentenced. The court to which the application is transferred must treat the application as a Rule 32 petition for post-conviction relief and the court and all parties must apply Rule 32's procedures.

COMMENT

This section provides that all Rule 32 proceedings, regardless of the grounds presented and their past characterizations, are to be treated as criminal actions. The characterization of the proceeding as criminal assures compensation for appointed counsel and the applicability of criminal standards for admissibility of evidence at an evidentiary hearing except as otherwise provided.

Rule 32 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq. The rule is intended to provide a standard procedure for accomplishing the objectives of all constitutional, statutory, or common law post-trial writs and remedies except those specified in this section.

Rule 32.4. Filing of Notice and Petition, and Other Initial Proceedings

(a) Notice of Post-Conviction Relief.

- (1) ***Filing.*** A defendant starts a post-conviction proceeding by filing a notice of post-conviction relief in the court where the defendant was convicted. The court must make blank “notice” forms available for defendants’ use.
- (2) ***Time for Filing.***

 - (A) ***Generally.*** In filing a notice, a defendant must follow the deadlines set forth in this rule. These deadlines do not apply to claims under Rule 32.1 (d) through (h).
 - (B) ***Time for Filing a Notice in a Capital Case.*** In a capital case, the Supreme Court clerk must expeditiously file a notice of post-conviction relief with the trial court upon the issuance of the mandate affirming the defendant’s conviction and sentence on direct appeal.
 - (C) ***Time for Filing a Notice in an Of-Right Proceeding.*** In a Rule 32 of-right proceeding, a defendant must file the notice no later than 90 days after the entry of judgment and sentence. A defendant may raise an of-right claim of ineffective assistance of Rule 32 counsel in a successive Rule 32 notice if it is filed no later than 30 days after the final order or mandate in the defendant’s of-right petition for post-conviction relief.
 - (D) ***Time for Filing a Notice in Other Noncapital Cases.*** In all other noncapital cases, a defendant must file a notice no later than 90 days after the entry of judgment and sentence or no later than 30 days after the issuance of the order and mandate in the direct appeal, whichever is later.
- (3) ***Content of the Notice.*** 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).
- (4) ***Duty of the Clerk upon Receiving a Notice.***

 - (A) ***Generally.*** Upon receiving a notice from a defendant, the superior court clerk must file it in the record of each original case to which it pertains and promptly send copies to the defendant, defense counsel, the prosecuting attorney’s office, and the Attorney General. If the conviction occurred in a limited jurisdiction court, the clerk for the limited jurisdiction court must send a copy of the notice to the prosecuting attorney who represented the State at trial, and to a self-represented defendant or defense counsel. In either court,

the clerk must note in the record the date and manner of sending copies of the notice.

(B) *Notice to an Appellate Court.* If an appeal of the defendant's conviction or sentence is pending, the clerk must send a copy of the notice of post-conviction relief to the appropriate appellate court within 5 days of its filing, and must note in the record the date and manner of sending the copy.

(5) *Duty of the State upon Receiving a Notice.* Upon receiving a copy of a notice, the State must notify any victim who has requested notification of post-conviction proceedings.

(b) Appointment of Counsel.

(1) *Capital Cases.* After the Supreme Court has affirmed a capital defendant's conviction and sentence, it must appoint counsel who meets the standards of Rule 6.8 for the defendant as required by A.R.S. § 13-4041 and Rule 6.5 if the defendant is indigent. Alternatively, the Supreme Court may authorize the presiding judge of the county where the case originated to appoint counsel. If the presiding judge makes an appointment, the judge must file a copy of the appointment order with the Supreme Court. If a capital defendant files a successive notice, the presiding judge must appoint the defendant's previous post-conviction counsel, unless the defendant waives counsel or there is good cause to appoint another qualified attorney from the list described in A.R.S. § 13-4041.

(2) *Rule 32 Of-Right and Noncapital Cases.* Within 15 days after the timely filing of a notice of a defendant's first Rule 32 proceeding or in any of-right proceeding, the presiding judge must appoint counsel for the defendant if the defendant requests it and the judge determines that the defendant is indigent. Upon the filing of all other notices in a noncapital case, the presiding judge may appoint counsel for an indigent defendant if requested.

(c) Time for Filing a Petition for Post-Conviction Relief

(1) *Capital Cases.*

(A) *Filing Deadline for First Petition.* In a capital case, the defendant must file a petition within 12 months after the first notice is filed.

(B) *Filing Deadline for Any Successive Petition.* On a successive notice in a capital case, the defendant must file the petition within 30 days after the notice is filed.

(C) *Time Extensions.* For good cause, the court may grant a capital defendant one 60-day extension in which to file a petition. The court may grant additional 30-day extensions for good cause.

(D) *Notice of Status.* The defendant must file a notice in the Supreme Court advising the Court of the status of the proceeding if a petition is not filed:

(i) within 12 months after counsel is appointed; or

(ii) if the defendant is proceeding without counsel, within 12 months after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

The defendant must file a status report in the Supreme Court every 60 days until a petition is filed

(2) *Noncapital Cases.*

(A) *Filing Deadline.* In a noncapital case, appointed counsel must file a petition within 60 days after the date of appointment. A defendant without counsel must file a petition within 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

(B) *Time Extensions.* For good cause, the court may grant a defendant in a noncapital case a 30-day extension to file the petition. The court may grant additional 30-day extensions only on a showing of extraordinary circumstances.

(d) *Duty of Counsel; Extension of Time for the Defendant.*

(1) *Duty.* In a Rule 32 proceeding, counsel must investigate the defendant's case for any and all colorable claims.

(2) *If Counsel Finds No Colorable Claims.*

(A) *Counsel's Notice.* In an of-right proceeding, if counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination. After counsel files a notice, counsel's role is limited to acting as advisory counsel until the trial court's final determination.

(B) *Defendant's Pro Se Petition.* Upon receipt of counsel's notice, the court must allow the defendant to file a petition on his or her own behalf, and extend the time for filing a petition by 45 days from the date counsel filed the notice. The

court may grant additional extensions only on a showing of extraordinary circumstances.

DOES THE TASK FORCE THINK THE COURT SHOULD HAVE AN OBLIGATION TO REVIEW THE RECORD [SIMILAR TO ANDERS]? SHOULD THE NOTICE INCLUDE A SUMMARY OF THE FACTS AND THE PROCEDURAL HISTORY OF THE CASE?

(e) Transcript Preparation.

- (1) ***Requests for Transcripts.*** If the trial court proceedings were not transcribed, the defendant may request that certified transcripts be prepared. The clerk must provide a form for the defendant to make this request.
 - (2) ***Order.*** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant will raise in the petition.
 - (3) ***Deadline.*** Certified transcripts must be prepared and filed within 60 days after the entry of the order granting the request.
 - (4) ***Cost.*** If the defendant is indigent, the transcripts must be prepared at county expense.
 - (5) ***Extending the Deadline for Filing a Petition.*** If a defendant requests the preparation of certified transcripts, the defendant's deadline for filing a petition under (c) is extended by the time between the request and either the transcripts' final preparation or the court's denial of the request.
- (f) Assignment of a Judge.** The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. If the sentencing judge's testimony will be relevant, the case must be reassigned to another judge.
- (g) Stay of Execution of a Death Sentence on a Successive Petition.** Once the defendant has received a sentence of death and the Supreme Court has fixed the time for executing the sentence, the trial court may not grant a stay of execution if the defendant files a successive petition. In those circumstances, the defendant must file an application for a stay with the Supreme Court, and the application must show with particularity any claims that are not precluded under Rule 32.2. If the Supreme Court grants a stay, the Supreme Court clerk must notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

COMMENT

Rule 32.4(b). If a petition is filed while an appeal is pending, the appellate court, under Rule 31.4(a), may stay the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment or sentence. See Rule 31.4(b)(2).

Rule 32.5. Contents of a Petition for Post-Conviction Relief

- (a) Form of Petition.** A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains relevant citations to the record and to legal authorities.
- (b) Length of Petition.** In Rule 32 of-right and noncapital cases, the petition must not exceed 28 pages. The State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages. In capital cases, the petition must not exceed 44 pages. The State's response must not exceed 44 pages, and defendant's reply must not exceed 22 pages.
- (c) Declaration.** A petition by a self-represented defendant must include declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief. The declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations.
- (d) Attachments.** The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the petition's allegations.
- (e) Effect of Non-Compliance.** The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 30 days after that order is entered to revise the petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 30 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling.

Rule 32.6. Response and Reply; Amendments; Review

- (a) State's Response.** The State must file its response within 45 days after the defendant files the petition. The court may grant the State a 30-day extension to file its response for good cause, and may grant the State additional extensions only on a showing of extraordinary circumstances. The State's response must include a memorandum that

contains relevant citations to the record and to legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations.

- (b) **Defendant's Reply.** The defendant may file a reply within 15 days after the response is served. The court may for good cause grant an extension of time.
- (c) **Amending the Petition.** After the filing of a post-conviction relief petition, the court may permit amendments only for good cause.
- (d) **Review and Further Proceedings.**

- (1) **Summary Disposition.** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition. Absent good cause, the court must make this determination in a non-capital proceeding within 20 days after the defendant's reply is due and in a capital proceeding within 60 days after the defendant's reply is due.
- (2) **Setting a Hearing.** If the court does not summarily dismiss the petition, it must set a hearing within 30 days on those claims that present a material issue of fact or law.
- (3) **Notice to Victim.** If a hearing is ordered, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.

Rule 32.7. Informal Conference

- (a) **Generally.** At any time, the court may hold an informal conference to expedite a proceeding for post-conviction relief.
- (b) **Capital Cases.** In a capital case, the court must hold an informal conference within 90 days after counsel is appointed on the first notice of a petition for post-conviction relief.
- (c) **The Defendant's Presence.** The defendant need not be present at an informal conference if defense counsel is present.

END 10/29/2016

Rule 32.8. Evidentiary Hearing

- (a) **Rights Attendant to the Hearing; Location; Record.** The defendant is entitled to a hearing to determine issues of material fact, and has the right to be present and to

subpoena witnesses for the hearing. The court may order the hearing to be held at the defendant's place of confinement if facilities are available and after giving at least 15 days' notice to the officer in charge of the confinement facility. In superior court proceedings, the court must make a verbatim record.

(b) Evidence. The Arizona Rules of Evidence applicable in criminal proceedings apply at the hearing, except that the defendant may be called to testify at the hearing.

(c) Burden of Proof. The defendant has the burden of proving factual allegations by a preponderance of the evidence. If the defendant proves a constitutional violation, the State has the burden of proving beyond a reasonable doubt that the violation was harmless.

(d) Decision.

(1) Timing. The court must rule within 10 days after the hearing ends, except in extraordinary circumstances if the volume of the evidence or the complexity of the issues require additional time.

(2) Findings and Conclusions. The court must make specific findings of fact and expressly state its conclusions of law relating to each issue presented.

(3) Decision in the Defendant's Favor. If the court finds in the defendant's favor, it must enter appropriate orders concerning:

(A) the conviction, sentence, or detention;

(B) any further proceedings, including a new trial and conditions of release; and

(C) other matters that may be necessary and proper.

(e) Transcript. On a party's request, the court must order the preparation of a certified transcript of the evidentiary hearing. The request must be made within the time allowed for filing a petition for review. If the defendant is indigent, preparation of the evidentiary hearing transcript will be at county expense.

Rule 32.9. Review

(a) Filing of a Motion for Rehearing.

(1) Timing and Content. Within 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

- (2) **Response and Reply.** An opposing party may not file a response to a motion for rehearing unless the court requests one, but the court may not grant a motion for rehearing without requesting and considering a response. If a response is filed, the moving party may file a reply within 10 days after it is served.
- (3) **Effect on Appellate Rights.** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under (c).

(b) Disposition if Motion Granted. If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing, or grant a new hearing and then either amend or reaffirm its previous ruling. In either case, it must state its reasons for amending a previous ruling. The State must notify the victim of any action taken by the court if the victim has requested notification.

(c) Petition and Cross-Petition for Review.

(1) Time and Place for Filing.

- (A) **Petition.** Within 30 days after the entry of the trial court’s final decision on a petition or a motion for rehearing, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (B) **Cross-Petition.** The opposing party may file a cross-petition for review within 15 days after a petition for review is served.
- (C) **Place for Filing.** The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.
- (D) **Computation of Time and Modifying Deadlines.** Rule 31.3(d) governs the computation of any appellate court deadline in this rule, and an appellate court may modify any deadline in accordance with Rule 31.3(e).

(2) Notice of Filing and Additional Record Designation. Within 3 days after a petition or cross-petition for review is filed, the petitioner and cross-petitioner must file with the trial court a “notice of filing.” The notice of filing may designate additional items for the record described in (e). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.4(d), or that were otherwise available to the trial court and the parties, and are material to the issues raised in the petition for review.

(3) Motions. The parties must file any motions for extensions of time to file petitions or cross-petitions for review in the trial court, which must decide the motions. The parties must file all other motions in the appellate court.

(4) *Form and Contents of a Petition or Cross-Petition for Review.*

- (A) *Form and Length.*** Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6. The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they were in the trial court's caption. The petition or cross-petition must not exceed 22 pages, exclusive of an appendix and copies of the trial court's rulings.
- (B) *Contents.*** A petition or cross-petition for review must contain:
- (i)** copies of the trial court's rulings entered under Rules 32.6(d), 32.8(d) and 32.9(b);
 - (ii)** a statement of issues the trial court decided that the defendant is presenting for appellate review;
 - (iii)** a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and
 - (iv)** reasons why the appellate court should grant the petition, including citations to supporting legal authority [, if known.]
- (C) *Effect of a Motion for Rehearing.*** The filing of a motion for rehearing under (a) does not limit the issues a party may raise in a petition or cross-petition for review.
- (D) *Waiver.*** A party's failure to raise any issue that could be raised in the petition or cross-petition for review constitutes a waiver of appellate review of that issue.

(5) *Appendix Accompanying Petition or Cross-Petition.*

- (A) *Generally.*** Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition.
- (B) *Capital Cases.*** In capital cases, the parties must submit an appendix that supports all of the petition's references to the trial court record, with copies of supporting portions of the record.

(C) *Noncapital Cases*. In non-capital cases, an appendix is not required, but the petition must contain specific references to the record to support all material factual statements.

(6) *Service; Response; Reply*.

(A) *Service*. A party filing a petition, cross-petition, appendix, response, reply, or a related filing must serve a copy of the filing on all other parties. The serving party must file a certificate of service complying with Rule 1.7(c)(3), identifying who was served and the date and manner of service.

(B) *Response*. A party opposing a petition or cross-petition may file a response within 30 days after the petition or cross-petition is served. The response must not exceed 22 pages, exclusive of an appendix, and must comply with the form requirements in (c)(4)(A). An appendix to a response must comply with the form and substantive requirements in (c)(5).

(C) *Reply*. A party may file a reply within 10 days after a response is served. The reply is limited to matters addressed in the response. It may not exceed 11 pages, must comply with the form requirements in (c)(4)(A), and may not include an appendix.

(7) *Amicus Curiae*. Rules 31.13(a)(7) and 31.15 govern the filing of, and responding to, an amicus curiae brief.

(d) Stay Pending Review. The State's filing of a motion for rehearing or a petition for review of an order granting a new trial will automatically stay further proceedings in the trial court until appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting of a stay pending further review is within the discretion of the trial court or the appellate court.

(e) Transmitting the Record to the Appellate Court.

(1) *In Of-Right and Noncapital Cases*. Within 45 days after receiving a notice of filing under (c)(2), the trial court clerk must transmit the record, including the trial court file and transcripts, to the appellate court.

(2) *In Capital Cases*. The trial court clerk may transmit the record of post-conviction proceedings to the appellate court only if the appellate court requests it. The record includes copies of the notice of post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings, all minute entries and orders issued in the post-conviction

proceedings, transcripts, and any exhibits admitted by the trial court in the post-conviction proceedings.

- (f) **Disposition.** The appellate court may grant review of the petition and may order oral argument. Upon granting review, it may grant or deny relief and issue other orders that it deems necessary and proper.
- (g) **Reconsideration or Review of an Appellate Court Decision.** The provisions in Rules 31.20 and 31.21 governing the filing of motions for reconsideration and petitions for review in criminal appeals apply to and govern motions for reconsideration and petitions for review of an appellate court decision entered under (g).
- (h) **Return of the Record.** After a petition for review is resolved, the appellate clerk must return the record to the trial court clerk for retention.
- (i) **Notice to the Victim.** Upon the victim's request, the State must notify the victim of any action taken by the appellate court.

Rule 32.10. Review of an Intellectual Disability Determination in Capital Cases

Within 10 days after the trial court makes a finding on intellectual disability, the State or the defendant may file with the Court of Appeals a petition for special action challenging the finding. The Rules of Procedure for Special Actions govern the special action, except the Court of Appeals must accept jurisdiction and decide the issue raised.

Rule 32.11. Extensions of Time; Victim Notice and Service

- (a) **Notice to the Victim.** If the victim in a capital case has filed a notice of appearance under A.R.S. § 13-4234.01, a party requesting an extension of time to file a brief must serve or otherwise provide notice of the request to the victim.

(b) Manner and Timing of Service or Notice.

- (1) **Victim's Choice of the Manner of Service.** The victim may specify in the notice of appearance whether the service of the request should be directly on the victim or whether it should go to another person, including the prosecutor, and whether service of the notice can be electronic, by telephone, or by regular mail. Service must be made in the manner specified in the victim's notice of appearance or, if no method is specified, by regular mail. If the victim has requested direct notification, the party requesting an extension of time must serve the victim with notice within 24 hours after filing the request.

(2) ***Service Through the Prosecutor.*** The party requesting the extension of time must serve the prosecutor's office handling the post-conviction proceeding, unless the victim specifies a different method in the notice of appearance. If the prosecutor has the duty to notify the victim on behalf of the defendant, the prosecutor must notify the victim within 24 hours of receiving the request.

(c) **Victim's Response.** A victim may file a response to the request no later than 10 days after it is served.

(d) **Factors.** In ruling on any request for an extension of a time to file a brief, the court must consider the rights of the defendant and the victim to a prompt and final conclusion of the case.

Rule 32.12. Post-Conviction Deoxyribonucleic Acid Testing

(a) **Generally.** Any person who has been convicted and sentenced for a felony offense may petition the court at any time for forensic deoxyribonucleic acid (DNA) testing of any evidence:

- (1) in the possession or control of the court or the State;
- (2) related to the investigation or prosecution that resulted in the judgment of conviction; and
- (3) that may contain biological evidence.

(b) **Manner of Filing; Response.** The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 32.4(a)(4). The State must respond to the petition within 45 days after it is served.

(c) **Appointment of Counsel.** The court may appoint counsel for an indigent defendant at any time during proceedings under this rule.

(d) **Court Orders.**

(1) ***Mandatory Testing.*** After considering the petition and the State's response, the court must order DNA testing if the court finds that:

- (A) a reasonable probability exists that the defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;
- (B) the evidence is still in existence and is in a condition that allows conducting of DNA testing; and

(C) the evidence was not previously subjected to DNA testing, or the evidence was not subjected to the type of DNA testing that defendant now requests and the requested testing may resolve an issue not resolved by previous testing.

(2) **Discretionary Testing.** After considering the petition and the State's response, the court may order DNA testing if the court finds that (d)(1)(B) and (C) apply, and that a reasonable probability exists that either:

(A) the defendant's verdict or sentence would have been more favorable if the results of DNA testing had been available at the trial leading to the judgment of conviction; or

(B) DNA testing will produce exculpatory evidence.

(3) **Laboratory; Costs.** If the court orders testing under (d), the court must select a laboratory to conduct the testing that meets the standards of the DNA advisory board. The court may require the defendant to pay the costs of testing.

(4) **Other Orders.** The court may enter any other appropriate orders, including orders requiring elimination samples from third parties and designating:

(A) the type of DNA analysis to be used;

(B) the procedures to be followed during the testing; and

(C) the preservation of some of the sample for replicating the testing.

(e) Test Results.

(1) **Earlier Testing.** If the State or defense counsel has previously subjected evidence to DNA testing, the court may order the party to provide all other parties and the court with access to the laboratory reports prepared in connection with that testing, including underlying data and laboratory notes.

(2) **Testing Under this Rule.** If the court orders DNA testing under this rule, the court must order the production to all parties of any laboratory reports prepared in connection with the testing and may order the production of any underlying data and laboratory notes.

(f) Preservation of Evidence. If a defendant files a petition under this rule, the court must order the State to preserve during the pendency of the proceeding all evidence in the State's possession or control that could be subjected to DNA testing. The State must prepare an inventory of the evidence and submit a copy of the inventory to the defendant and the court. If evidence is destroyed after the court orders its

preservation, the court may impose appropriate sanctions, including criminal contempt, for a knowing violation. [DISCUSS]

(g) Unfavorable Test Results. If the results of the post-conviction DNA testing are not favorable to the defendant, the court must dismiss without a hearing any DNA-related claims asserted under Rule 32.1. The court may make further orders as it deems appropriate, including orders:

- (1) notifying the Board of Executive Clemency or a probation department;
- (2) requesting to add the defendant's sample to the federal combined DNA index system offender database; or
- (3) notifying the victim or the victim's family.

(h) Favorable Test Results. Notwithstanding any other provision of law that would bar a hearing as untimely, the court must order a hearing and make any further orders that are required by statute or the Arizona Rules of Criminal Procedure if the results of the post-conviction DNA testing are favorable to the defendant. If there are no material issues of fact, the hearing need not be an evidentiary hearing, but the court must give the parties an opportunity to argue why the defendant should or should not be entitled to relief under Rule 32.1 as a matter of law.

Rule 40. Transfer for Juvenile Prosecution

- (a) **Scope.** This rule applies to defendants who are eligible for transfer to juvenile court under A.R.S. § 13-504.
- (b) **Initiation.** The court must hold a hearing to determine whether prosecution of a defendant should be transferred to juvenile court if:
- (1) the defendant files a motion requesting transfer; or
 - (2) the court enters an order stating that a transfer hearing is being set in the court's discretion or is required by law.
- (c) **Contents of Motion and Court Order.** The motion or order under (b) must designate the offense or offenses that are the subject of the transfer hearing.
- (d) **Timing.**
- (1) ***Request for Transfer.*** A motion for transfer or a court order setting a transfer hearing must be filed within 45 days of the arraignment date.
 - (2) ***Hearing Date.*** The court must hold a transfer hearing within 45 days after a motion or order is filed under (b). The court may continue the hearing for good cause.
- (e) **Disclosure.** Setting a hearing under (d)(2) does not suspend the parties' Rule 15 disclosure duties.
- (f) **Transfer Investigation.** After the court sets a transfer hearing, it may order the adult or juvenile probation departments to conduct a transfer investigation and prepare a written report that addresses issues the court will consider at the transfer hearing. The adult and juvenile probation departments may confer as necessary to complete the investigation. The court must provide a copy of the report to all parties at least 5 days before the hearing, unless the parties waive the deadline.
- (g) **Prior Transfer.** The court may waive the provisions of (f) if an Arizona court has previously transferred the defendant for juvenile prosecution. The court may consider, and must provide to the parties, any prior orders of transfer, probation reports, or reports pertaining to physical, psychological, or psychiatric evaluations introduced into evidence in a prior transfer proceeding.
- (h) **Transfer Hearing.** At a transfer hearing, the court must determine whether the defendant has shown by clear and convincing evidence that public safety and the rehabilitation of the defendant, if adjudicated delinquent in juvenile court, would be

best served by transferring the prosecution to juvenile court. The court must consider those factors provided in A.R.S. § 13-504(D).

(i) Privilege.

(1) *Statements About Events Relating to Charged Offenses.* Unless the defendant consents, the defendant's statements obtained under (f), or evidence resulting from those statements, concerning the events that form the basis of the charges against the defendant are inadmissible in any proceeding to determine the defendant's guilt of those charges.

(2) *Statements About Other Events or Transactions.* Unless the defendant consents, the defendant's statements obtained under (f), or evidence resulting from those statements, concerning any other events or transactions are inadmissible in any proceeding to determine the defendant's guilt of other offenses based on those events or transactions.

(3) *Right to Remain Silent.* A defendant's decision to testify at the transfer hearing does not waive the defendant's right to remain silent during the trial or adjudication hearing. Neither the fact that the defendant testified at the transfer hearing nor the defendant's testimony at the hearing may be mentioned to the trier of fact unless the defendant testifies at trial concerning the same matters.

(j) Order of Transfer. After the transfer hearing, the court must determine with all possible speed whether to transfer the defendant to juvenile court. It must state its reasons in writing in a minute entry or order, and may not take any other action in the case until it makes this determination.

(k) Further Juvenile Proceedings. If the court orders the defendant's transfer for juvenile prosecution, the indictment or information will serve as the juvenile petition for the transferred charges. Within 48 hours of the order transferring prosecution, the clerk must file a copy of the indictment or information in the juvenile court.

(l) Release. If the court orders the defendant's transfer for juvenile prosecution, the court must determine if the defendant should be released or detained in a juvenile detention facility pending further proceedings. In making the release determination, the court must consider the factors listed in Rule 23(D), Rules of Procedure for the Juvenile Court.