Rule 32 Task Force

Meeting Agenda

Friday, March 22, 2019
12:30 p.m. to 5:00 p.m.

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

Item no. 1	**Call to Order** **Introductory remarks**	*Hon. Joseph Welty, Chair*
Item no. 2	**Approval of the December 4, 2018 meeting minutes**	*Judge Welty*
Item no. 3	**Discussion of staff's notes regarding Rules 32 and 33**	*All*
Item no. 4	**Discussion of proposed forms**	*All*
Item no. 5	**Discussion of Rules Forum comments**	*All*
Item no. 6	**Discussion of other rule petitions concerning Rule 32**	*All*
Item no. 7	**Discussion of an amended rule petition**	*All*
Item no. 8	**Roadmap**	*Judge Welty*
Item no. 9	**Call to the Public** **Adjourn**	*Judge Welty*

The Chairs 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.

Rule 32 Task Force

State Courts Building, Phoenix

Meeting Minutes: December 4, 2018

Members attending: Hon. Joseph Welty (Chair), Timothy Agan, Hon. James Beene, Hon. Kent Cattani, Hon. Peter Eckerstrom, David Euchner, Jennifer Garcia by her proxy Ellie Hoecker, Jason Kreag, Dan Levey, Michael Mitchell, Hon. Samuel Myers (by telephone), David Rodriquez, Hon. James Sampanes, Mikel Steinfeld by his proxy Grace Guisewite, Lacey Stover Gard, Hon. Danielle Viola

Absent: Hon. Cathleen Brown Nichols, Hon. Kellie Johnson, Hon. Rick Williams

Guests: Kathryn Andrews

Task Force Staff: Beth Beckmann, Mark Meltzer, Angela Pennington

1. **Call to order; introductory remarks; approval of meeting minutes.** The Chair called the fifth Task Force meeting to order at 10:09 a.m. and introduced the proxies. He then asked members to review the November 9 draft meeting minutes. There were no corrections and a member made the following motion:

> **Motion:** To approve the November 9, 2018 minutes. The motion received a second and it passed unanimously. **R32TF: 005**

The Chair noted the contents of today's meeting packet included comparison versions of the draft rules. He advised that today's meeting would focus on a section-by-section review of the most recent drafts of Rules 32 and 33.

2. Review of draft Rules 32 and 33. The most recent drafts of Rules 32 and 33 were identified as the November 9, 2018 versions. The Chair requested Judge Cattani to provide an overview of these drafts, beginning with Rule 32.1.

Rules 32.1 and 33.1 ("scope of remedy"): Judge Cattani made a few suggested edits to Rules 32.1 and 33.1 after the November 9 meeting, which are shown in the materials by strikethrough and underline. Rule 32.1 no longer includes provisions that pertain to pleading defendants, except for pleading defendants in capital cases. Provisions that pertain to pleading defendants are in Rule 33.1. There is a significant revision to section (c) of both rules. Rule 32.1(c), as most recently modified by Judge Cattani, provides a remedy when "the sentence is not authorized by law." Rule 33.1(c) provides a corresponding remedy when "the sentence is not authorized by law or by the plea agreement." Members had no objection to the additional words, "or by the plea agreement," in Rule 33.1(c).

Members discussed the application of these sections to a recurring situation where the defendant is sentenced with an expectation that he or she will receive good-time credits ("GTC"), but the Arizona Department of Corrections ("ADOC") thereafter computes a release date based on statutory requirements for flat time. The ADOC typically receives only a sentencing minute

entry, whereas the expectation of GTC may be memorialized in a written plea agreement or in the reporter's transcript of a change-of-plea or sentencing proceeding.

A member asked whether a defendant's claim under the foregoing circumstances would be under section (c) or section (d) ("the defendant continues to be or will continue to be in custody after his or her sentence expired"). The member noted that the claim does not challenge the sentence, but rather it challenges the way it is carried out by the ADOC. The member's concern is that a section (c) remedy might result in the defendant being resentenced, possibly to a longer term, whereas a section (d) remedy would enforce the sentence as the court and parties intended. Another member asked whether the recently added words in (d) ("the defendant continues to be or will continue to be held in custody after his or her sentence has expired") which expands application of the subsection so that relief can be obtained before the sentence has allegedly expired, would address the member's expressed concern. The member replied that it did not. A judge member then suggested adding these words to section (c): "the sentence as imposed by the judge or as computed by the Arizona Department of Corrections is not authorized by law [and, in Rule 33.1(c), 'or by the plea agreement'.]" Although the first member thought this might conflict with Rule 24.3, which gives the trial court only 60 days to modify a sentence, the judge member believed this new section (c) language would give the court jurisdiction to take appropriate remedial action, and will permit the court to give the defendant, when appropriate, the benefit of the plea bargain. Members agreed and approved these modifications to section (c).

Members then discussed revisions to section 32.1(e) and 33.1(e). First, in both rules, the word "probably," ("newly discovered material facts probably exist, and those facts probably would have changed…"), which is in the existing rule but was deleted in the proposed versions of Rules 32 and 33, was restored after members expressed concerns that removal narrowed the scope of relief and heightened the burden for defendants. Second, the word "judgment" replaced the word "verdict" in the current version of Rules 32.1(e) and was added to the proposed version of 33.1(e), which initially limited relief to the sentence. Both provisions now say, "probably would have changed the judgment or sentence," and in the final version these phrases will be identical.

Similarly, the members agreed to replace the word "conviction" in current Rule 32.1(g) with "judgment" ("would probably overturn the defendant's conviction or sentence") and to add the word "judgment" to the proposed version of Rule 33.1(g), which in the draft limited relief to the sentence. Both versions now read, "there has been a significant change in the law that . . . would probably overturn the defendant's judgment or sentence."

The November 9 draft did not include Mr. Steinfeld's proposed language for Rule 32.1(h), which members agreed on during the November 9 meeting (see the November 9 meeting minutes, at page 4 of 6). The approved language was substituted in the draft. In Rule 33.1(h), members removed the words, "the defendant would not have pled guilty," because they duplicated the intended effect of revised Rule 33.1(e). Judge Cattani noted that he deleted the comment to Rules 32.1(c) and 33.1(c) because the comment restated the rule and was not otherwise helpful. Members concurred with the deletion.

Rules 32.2 and 33.2 ("preclusion of remedy"): Judge Cattani explained the differences in these two rules. Among them, Rule 32.2(a) contains a provision about claims still raiseable on

appeal, which is not in Rule 33.2 because a pleading defendant does not have a right to direct appeal; whereas Rule 33.2(a) includes a provision about claims waived by pleading guilty, which is not in Rule 32.2. A member was concerned about the possible impact of these provisions on a defendant who proceeded to trial on certain counts but entered guilty pleas on other counts. Members agreed to add to Rule 33.2 the words, "waived by pleading guilty to the offense" to clarify that a defendant in those circumstances would not be precluded from raising post-conviction claims arising from the trial. The Chair would be interested in public comments on this provision.

Members also discussed Judge Cattani's proposed comment to Rule 33.2(a)(1) concerning claims a defendant waives by a guilty plea. To reflect case law, Ms. Beckmann suggested changing the phrase "acceptance of the plea" in the proposed comment to "validity of the plea." Members agree to "acceptance or validity of the plea," but they declined to add similar language to the body of the rule. Members also considered adding a second sentence to Judge Cattani's comment to further clarify what a defendant can and cannot constitutionally waive by entering a guilty plea. After discussing suggested versions, members agreed on the following: "This provision is not intended to expand or contract what is waived by the entry of a plea under current case law."

Another issue arose later in the meeting about whether the current language of Rule 33.2 could be interpreted to preclude a pleading defendant from bringing a successive claim challenging the effectiveness of PCR counsel in the first petition (i.e., another Rule 33.1(a) claim.) Members agreed that Rule 33.2 should clarify that such claims are an exception to preclusion. Members accordingly made two changes to Rule 33.2(b). First, they relocated language in the November 9 draft of Rule 33.2(b) as a new subpart (b)(1) and titled this subpart "generally." Subpart (b)(2), which is new, has the title, "ineffective assistance of post-conviction counsel." It provides, "A defendant is not precluded from filing a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding."

Rules 32.3 and 33.3 ("nature of a post-conviction proceeding and relation to other remedies"): The current rule, and a comment to the November 9 version, refer to habeas corpus, but the body of November 9 draft of this rule does not. Some members were concerned that an unintended consequence of this omission in the November 9 draft of the rule might be an increased volume of extraordinary writs. Others were concerned that the November 9 draft might result in treating Rule 24 motions as Rule 32 petitions. Members therefore made two revisions to Rules 32.3 and 33.3. First, in section (b) ("other applications or requests for relief"), members added the underlined words: "If a court receives any type of application or request for relief, however titled, which challenges the validity of the defendant's conviction or sentence…." Second, they added a sentence to the comment that says, "This rule does not limit remedies that are available under Rule 24."

Rules 32.4 and 33.4 ("filing a notice requesting post-conviction relief"): These rules include provisions on the time for filing a notice of post-conviction relief. The drafts provide that claims on the grounds specified in (b) through (h) of the respective rules must be filed "within a

reasonable time after discovering the basis of the claim." Members discussed whether to modify "reasonable time" to a specific time, such as 90 days from when the defendant learns about the claim. They declined to do this. They concluded that what is reasonable might vary, based on the facts and circumstances of each case, like the concept of "due diligence" for claims of newly discovered evidence under Rule 32.1(e) and 33.1(e). Another member was concerned that if the defendant knew of facts underlying a claim yet not their legal significance, and accordingly did not raise the claim previously, the defendant might be barred from raising a legitimate claim, such as lack of subject matter jurisdiction, later in the proceeding. But a judge member noted that the draft rule requires that the defendant had actual knowledge of the claim, and not that the defendant should have known about it. Moreover, the reasonable time provision is intended to promote finality, and not to bar meritorious claims.

There is also a subpart in both rules about excusing an untimely notice for claims under Rules 32.1(a) and 33.1(a); these claims have a time requirement. The draft showed this subpart with strikethrough. Members revised the draft. It now allows the court to excuse an untimely notice "if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." Members discussed whether this was redundant to Rule 33.1(f); they agreed it was not because, among other things, Rule 33.4 requires an adequate explanation, which is not mentioned in Rule 33.1(f). The relevant portion of Rule 33.4 provides that the court "may" excuse an untimely notice. A member suggested changing this to must, because if the defendant provides an adequate explanation, the court has no discretion to dismiss an untimely notice. Members agreed.

Rule 32, subpart (b)(4)(C), provides that if an appeal is pending, the trial court clerk is required to notify the appellate court of the filing of a PCR notice and the trial court's final ruling in the PCR proceeding. Members agreed to delete only the requirement that the clerk notify the appellate court of the trial court's final ruling because that provision conflicts with Rule 32.15. There is no corresponding provision in Rule 33 because there should be no appeal following the entry of a guilty plea.

Rules 32.5 and 33.5 ("appointment of counsel"): Members raised two issues. The first issue concerned language in the current draft that required the trial court to appoint counsel "after the defendant has timely filed a notice…." Members agreed that this was incomplete and changed the provision to now require the appointment of counsel "after the defendant filed a timely or first notice." The second issue concerned the omission of a requirement that defendant is entitled to appointed counsel. Members accordingly added to both rules the following: "the defendant is entitled to appointed counsel under Rule 6.1(b) ["right to a court-appointed attorney"]." Section (a) was reformatted so the requirements are in a list of three items.

Rules 32.6 and 33.6 ("duty of counsel; defendant's pro se petition; waiver of attorney-client privilege"): These revised rules include a provision that is not found in current Rule 32, concerning discovery in a PCR proceeding. In *Canion v Cole,* the Supreme Court allowed discovery in a post-conviction proceeding after the defendant filed a post-conviction petition upon a showing of good cause. Members previously agreed that the court should allow discovery at an earlier stage, specifically, after the filing of a notice. (See the discussion at pages 3-4 of the

August 31, 2018 meeting minutes.) The November 9 draft of these rules accordingly included a section (b) that allowed pre-petition discovery on a showing of good cause. The Chair reminded members that they had previously discussed different standards depending on whether the discovery request was made before or after the filing of a petition. Before proceeding, the Chair took a straw vote to reconfirm the members' decision at the August 31 meeting. Seven members supported pre-petition discovery, and seven opposed it. The Chair broke the tie by supporting pre-petition discovery in appropriate circumstances.

However, the Chair believed, and members concurred, that the standard for pre-petition discovery should be higher than for post-petition discovery. Members accordingly agreed to separate section (b) of these rules into two subparts. Subpart (1) will address discovery after filing a notice. It requires a showing of substantial need and includes text based on Rule 15.1(g) ("disclosure by court order.") A new comment to the rule confirms that the standard for pre-petition discovery derives from Rule 15.1(g). Subpart 2 addresses discovery after filing a petition. The text of subpart (2) will be taken from the November 9 draft and requires a showing of good cause.

Members modified the November 9 version of Rule 33.6(e) ("counsel's notice of no colorable claims") by deleting the erroneous reference to an avowal and substituting language that is identical to Rule 32.6(e) ("In the notice, counsel should also identify the following….")

Rules 32.7 and 33.7 ("petition for post-conviction relief"): Rule 32.7(c) addresses the length of petitions. It provides a 28-page limit for non-capital cases and an 80-page limit for capital cases.

The Criminal Rules Task Force had recommended an increase in the page-limit for petitions in capital cases, from 60 pages to the current 80 pages, concurrent with a required increase in font size. Notwithstanding this recent increase, members believed that 80 pages was still inadequate, and concurred that petitions are often twice that length. Members noted that if issues are not raised in a state court petition, they might be procedurally defaulted in federal court, and it is of utmost importance that state court counsel preserve these issues in the petition. What might be a marginal claim now might become significant in the future, and the petition should include such claims. Mitigation issues can consume many pages. Moreover, after counsel files a petition, the court might not set an evidentiary hearing, so the petition needs to be a comprehensive and exhaustive record. One member contended that counsel should not be compelled to sacrifice arguments simply to meet page limits. Prosecutor and defense members agreed that 80 pages was inadequate for petitions and responses in capital cases. On the other hand, judges routinely expect counsel to submit over-limit petitions along with motions to exceed the limits. Members concurred that there was no "magic number" as a page limit for capital petitions, and that regardless of what the rule specified, counsel would, if necessary, move to exceed it. The current rule says, "not to exceed 80 pages." Members considered adding a "safety valve" by expressly indicating that parties could move to extend the limits. Instead, however, and by a vote of 10 in favor and 5 opposed, they agreed to change Rule 32.7's limit for capital case petitions to "not to exceed 160 pages."

Rules 32.8 and 33.8 ("transcript preparation"): Members had no changes.

Rules 32.9 and 33.9 ("response and reply; amendments"): In accordance with the change in Rule 32.7 regarding the page limit of a capital case petition, members modified Rule 32.9(c) ("length of response and reply") to increase the limit of the State's response to a petition in a capital case from 80 pages to "not to exceed 160 pages," and to increase the defendant's reply from 40 pages to "not to exceed 80 pages."

Rules 32.10 and 33.10 ("assignment of a judge"): The November 9 drafts of these rules include provisions for a Rule 10.1 and Rule 10.2 change of judge, and for allowing the assigned PCR judge to hear and decide disputes concerning access to public records requested for a PCR proceeding. Members had no changes to these rules.

Rules 32.11 and 33.11 ("court review of the petition, response, and reply; further proceedings"): Members had no changes to these rules. Both rules include a section permitting the court to order a competency evaluation of the defendant, if necessary for presentation of a claim.

Rule 32.12 and 33.12 ("informal conference"): Rule 32.12(b) includes a provision applicable only to capital cases, which is omitted from Rule 33.12. Members had no changes to these rules.

Rules 32.13 and 33.13 ("evidentiary hearing"): Members had no changes to these rules. One member mentioned that parties require about 30 days to obtain a writ for transporting an incarcerated defendant to the courthouse and expressed concern regarding the 15-day notice provision in section (a); however, that notice provision applies only when the hearing is held at the defendant's place of confinement.

Rules 32.14 and 33.14 ("motion for rehearing"): Members had no changes to these rules.

Rules 32.15 and 33.15 (notification to the appellate court"): The November 9 drafts had identical provisions, but members changed both. Rule 32.15 was changed by reverting to a previous version, which requires the defense to notify the appellate court of any trial court ruling granting or denying relief on a defendant's notice or petition for post-conviction relief, or any motion for rehearing. Rule 33.15 was changed by substituting the words "a petition for review" for "an appeal," and by requiring notice of relief "granted or denied" by the trial court.

Rules 32.16 and 33.16 ("petition and cross-petition for review"): Members revised section (a) ("time and place of filing"), subpart (1) ("petition") to allow for the filing of a petition for review not only based on the trial court's "final decision on a petition or a motion for rehearing," but also for "the dismissal of a notice."

In Rule 32.16 (c) ("form and contents of a petition or cross-petition for review"), members added a new sentence applicable to capital cases, because there is no corresponding provision in the current rule. The new sentence requires that a petition for review or a response to a petition for review in a capital case "must not exceed 12,000 words or 50 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings."

Rules 32.16(c)(2) and 33.16(c)(2) require the petition to include copies of the trial court's rulings. Members agreed to add cross-references in these rules concerning the court's summary

disposition of a PCR notice. The Chair directed staff to check the other cross-references in these provisions.

Rule 32.17 ("stay of execution of a death sentence on a successive petition"): Members observed that this provision corresponds to current Rule 32.4(g), and they had no changes.

Rule 32.18 ("review of an intellectual disability determination in capital cases"): This provision corresponds to current Rule 32.10. Members had no changes.

Rule 32.19 and Rule 33.17 ("extension of time; victim notice and service"): Members discussed the application of the statutory provision referred to in this rule, A.R.S. § 13-4234.01, as well as other statutes regarding victims' rights. They concluded that the reference in current Rule 32.11 to A.R.S. § 13-4234.01 applied only to capital cases, which are addressed in Rule 32, and that it had no application to non-capital cases. They accordingly deleted draft Rule 33.17.

Rules 32.20 and 33.18 ("post-conviction deoxyribonucleic acid testing"): Judge Cattani noted that the November 9 version eliminated the distinction between mandatory testing and discretionary testing because the distinction did not appear to be meaningful. Members had no opposition to that revision. A member observed that Rules 32 and 33 had parallel subject matter provisions up to and including Rules 32.16 and 33.16. The member proposed renumbering the DNA rules as Rules 32.17 and 33.17 to retain this symmetry, and renumbering Rules 32.17, 32.18, and 32.19, which apply to capital cases and have no analog in Rule 33, as Rules 32.18, 32.19, and 32.20. Members concurred with this proposal.

The section-by-section review demonstrated the duplication of a significant number of Rule 32 and Rule 33 provisions. The Chair inquired of the members once again if they would prefer to reduce the duplication by having two separate rules with differentiated provisions, and a third rule with provisions common to both pleading and non-pleading defendants. The members preferred the approach previously taken by the Task Force, i.e., having standalone Rules 32 and 33. See further the November 9 meeting minutes at pages 2-3, where the members formally approved the bifurcated rules concept.

3. **Rule petition and roadmap.** Today's materials packet contained a draft rule petition. Staff will revise the draft to include items discussed during today's meeting. The Chair advised that the petition would include final versions of Rules 32 and 33, and an explanation of changes to the current rule. The petition will not include redline versions because of the extent of the revisions. The Chair invited Ms. Gard to submit a summary of her position concerning Rule 32.1(h) for inclusion as an appendix to the petition. He requested Judge Viola and Mr. Steinfeld to review Rule 41, Forms 23, 24(b), and 25, and to prepare changes that will conform these forms to the final versions of Rules 32 and 33.

The Chair noted that he and staff and others working at his direction will need to proofread and correct items in the draft rules, petition, and appendices, including grammatical and syntactical editing and renumbering but not including substantive changes to the rules, and he asked the members for their authority to make these revisions.

Motion: A member moved to give the Chair the authority as specified above. The motion received a second and it passed unanimously. **R32TF: 006**

The Chair added that staff would endeavor to circulate the documents to the members prior to filing. He requested the members to review these documents before the filing deadline. The deadline for filing a rule petition is January 10, 2019.

The Chair reviewed the rule petition process. The Court will open the petition for public comments, which are due by May 1. Members will then reconvene to discuss the comments, and they will prepare a reply and further revisions to the proposed rules. The Chair with the members agreement set the next Task Force meeting for Friday, May 10, 2019. The Court will consider the petition, comments, and reply at its rules agenda at the end of August or beginning of September 2019. The customary effective date of new rules is January 1 of the following year.

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

5. **Adjourn.** The meeting adjourned at 4:40 p.m.

Rule 32. Post-Conviction Relief for Defendants Sentenced Following a Trial or a Contested Probation Violation Hearing

Rule 32.1. Scope of Remedy

Generally. A defendant may file a notice requesting post-conviction relief under this rule if the defendant was convicted and sentenced for a criminal offense after a trial or a contested probation violation hearing, or in any case in which the defendant was sentenced to death.

No Filing Fee. There is no fee for filing a notice of post-conviction relief.

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 Arizona constitutions;

(b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;

(c) the sentence, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law;

(d) the defendant continues to be or will continue to be in custody after his or her sentence expired;

(e) newly discovered material facts probably exist, and those facts probably would have changed the judgment 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 such critical significance that the impeachment evidence probably would have changed the judgment or sentence.

(f) the failure to timely file a notice of appeal was not the defendant's fault;

(g) there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment 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 of the offense beyond a reasonable doubt, or that no reasonable fact-finder would have imposed the death penalty.

COMMENT

Rule 32. l(a). This provision encompasses most traditional post-conviction claims, such as the denial of counsel, incompetent or ineffective counsel, or violations of other rights based on the United States or Arizona constitutions.

Rule 32.1(d). This provision is intended to include claims such as miscalculation of sentence or computation of sentence credits that result in the defendant remaining in custody when he or she should be free. It is not intended to include challenges to the conditions of imprisonment or correctional practices.

STAFF NOTE: Perhaps the comment to 32.1(d) should be clarified. It refers to a claim for a miscalculation of sentence or computation of sentence credits. But 32.1(c) uses the word "computed," and the comment to (d) might appear to apply to (c) claims.

Rule 32. l(h). This claim is independent of a claim under Rule 32.1(e) concerning newly discovered evidence. A defendant who establishes a claim of newly discovered evidence need not comply with the requirements of Rule 32.1(h).

Rule 32.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 32.1(a) based on any ground:

(1) still raiseable 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 post-conviction proceeding; or

(3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded. Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a). However, when a defendant raises a claim that falls under Rule 32.l(b) through (h) in a successive or

untimely post-conviction notice, the defendant must 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 provide reasons why defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. A court at any time may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

~~(b)~~ **STAFF NOTE: Why aren't (b) through (h) claims subject to preclusion under (a) if the claim was, e.g., previously adjudicated on appeal? The blanket provision in the second sentence of 32.2(b) that (b) through (h) claims "are not subject to preclusion under 32.2(a)" would seemingly permit a Rule 32 petition to raise such a previously adjudicated claim, and the second sentence in 32.2(b) does not appear to apply to previously adjudicated appellate claims.**

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 Rule 24 motions and habeas corpus.

(b) Other Applications or Requests for Relief. If a court receives any type of application or request for relief—however titled—that challenges the validity of the defendant's conviction or sentence following a trial, it must treat the application as a petition for post-conviction relief. If that court is not the court that convicted or sentenced the defendant, it must transfer the application or request for relief to the court where the defendant was convicted or sentenced.

(c) Defendant Sentenced to Death. A defendant sentenced to death in a capital case must proceed under Rule 32 rather than Rule 33 for all post-conviction issues, even if the defendant pled guilty to first-degree murder or other crimes.

~~(c)~~ **STAFF NOTE: Was the Task Force going to include -- in either the body of the rule or the comment -- guidance about the applicability of Rule 32 when a defendant pled guilty to an offense but had a trial on an aggravator?**

COMMENT

This rule provides that all Rule 32 proceedings 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., which provides a remedy for individuals who are unlawfully committed, detained, confined, or restrained. But if a convicted defendant files a petition for a writ of habeas corpus (or an application with a different title) that seeks relief available under Rule 32, the petition or application will be treated as a petition for post-conviction relief.

This rule does not limit remedies that are available under Rule 24.

Rule 32.4. Filing a Notice Requesting Post-Conviction Relief

(a) Generally. A defendant starts a Rule 32 proceeding by filing a Notice Requesting Post-Conviction Relief.

(b) Notice Requesting Post-Conviction Relief.

(1) ***Where to File; Forms.*** A defendant must file a notice requesting post-conviction relief under Rule 32 in the court where the defendant was sentenced. The court must make "notice" forms available for defendants.

(2) ***Content of the Notice.*** The notice must contain the caption of the original criminal case or cases to which it pertains, and all information shown in Rule 41, Form ~~__~~.24(b).

(3) ***Time for Filing.***

(A) *Claims under Rule 32.1(a).* A defendant must file the notice for a claim under Rule 32.1(a) within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later.

(B) *Claims under Rule 32.1(b) through (h).* A defendant must file the notice for a claim under Rule 32.1(b) through (h) within a reasonable time after discovering the basis of the claim.

(C) *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.

(D) *Excusing an Untimely Notice.* The court must excuse an untimely notice of post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault.

~~**(D)**~~

(4) ***Duty of the Clerk upon Receiving a Notice.***

(A) *Superior Court*. Upon receiving a notice, the superior court clerk must file the notice in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, defendant's counsel, the prosecuting attorney's office, and the Attorney General. The clerk must note in the record the date and manner of sending copies of the notice.

(B) *Justice or Municipal Court.* If the conviction occurred in a limited jurisdiction court, upon receiving a notice from a defendant, the limited jurisdiction court clerk must send a copy of the notice to the prosecuting attorney who represented the State at trial, and to defendant's counsel or the defendant, if self-represented. The clerk must note in the record the date and manner of sending copies of the notice.

(C) *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.

~~PROPOSED~~ COMMENT

A Notice Requesting Post-Conviction Relief informs the trial court of a possible need to appoint an attorney for the defendant as provided in Rule 32.5. The Notice Requesting Post-Conviction Relief also assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

~~CURRENT~~ COMMENT TO RULE 32.4(b)(4)(C)

If a petition is filed while an appeal is pending, the appellate court, under Rule 31.3(b), may suspend 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 3l.4(b) (requiring consolidation unless good cause exists not to do so).

STAFF NOTE: Are there circumstances where the trial court could suspend the PCR until the appeal is resolved, and if so, does this rule accommodate that circumstance?

Rule 32.5. Appointment of Counsel

(a) Noncapital Cases. No later than 15 days after the defendant has filed a timely or first notice under Rule 32.4, the presiding judge must appoint counsel for the defendant if:

(1) the defendant requests it;

(2) the defendant is entitled to appointed counsel under Rule 6.1(b); and

(3) there has been a previous determination that the defendant is indigent, or the defendant has completed an affidavit of indigency and the court finds that the defendant is indigent.

STAFF NOTE: Rule 33.5 also includes this sentence, which would apply to notices that are not timely or first: "Upon filing of all other Rule 33 notices, the presiding judge may appoint counsel for an indigent defendant if requested." Should that sentence be included in Rule 32.5? Note also the different organization between 32.5 and 33.5; they should be uniform.

~~(3)~~

(b) Capital Cases. After the Supreme Court has affirmed an indigent capital defendant's conviction and sentence, the Supreme Court or its designee must appoint counsel who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. If the Supreme Court has authorized the presiding judge of the county where the case originated to appoint counsel, the presiding 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 who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. On application and if the trial court finds that such assistance is reasonably necessary, it must appoint co-counsel.

(c) Appointment of Investigators, Expert Witnesses, and Mitigation Specialists. On application and if the trial court finds that such assistance is reasonably necessary for an indigent defendant, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7 at county expense.

~~(c)~~ **STAFF NOTE: "reasonably necessary" or "reasonable and necessary?"**

(d) Attorney-Client Privilege and Confidentiality for the Defendant. The defendant's prior counsel must share all files and other communications with post-conviction counsel. This sharing of information does not waive the attorney-client privilege or confidentiality claims.

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

(a) Generally. In a Rule 32 proceeding, counsel must investigate the defendant's case for any colorable claims.

(b) Discovery.

(1) ***After Filing a Notice.*** After the filing of a notice, the court upon a showing of substantial need for the material or information to prepare the defendant's case may enter an order allowing discovery. To show substantial need, the defendant must demonstrate that the defendant cannot obtain the substantial equivalent by other means without undue hardship.

(2) ***After Filing a Petition.*** After the filing of a petition, the court may allow discovery for good cause. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim.

~~(2)~~ STAFF NOTE: Subpart (2) includes a "materiality" requirement. Should subpart (1) also include that requirement?

(c) Counsel's Notice of No Colorable Claims. If counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination, and promptly provide a copy of the notice to the defendant. The notice must include or list:

(1) a summary of the facts and procedural history of the case;

(2) the specific materials that counsel reviewed;

(3) the date counsel provided the record to the defendant, and the contents of that record;

(4) the dates counsel discussed the case with the defendant;

(5) the charges and allegations presented in the complaint, information, or indictment.

In the notice, counsel should also identify the following:

(6) any adverse pretrial rulings affecting the course of trial (e.g., motions to suppress, motions *in limine*, motions to quash, speedy trial motions);

(7) any adverse rulings during trial on objections or motions (e.g., objections regarding the admission or exclusion of evidence, objections premised on

prosecutorial or judicial misconduct, mistrial motions, motions for directed verdict);

(8) any adverse rulings on post-trial motions (e.g., motion for a new trial, motion to vacate judgment);

(9) issues regarding jury selection, if the trial was to a jury;

(10) issues regarding jury instructions, if the trial was to a jury;

(11) any potential errors for which there were no objections, but which may rise to the level of fundamental error;

(12) any determination of the defendant's competency that was raised prior to sentencing;

(13) any objections raised at the time of sentencing;

(14) the court's determination of the classification and category of offenses for which the defendant was sentenced; ~~the court's determination of the classification and category of offenses for which the defendant was sentenced;~~

(15) the court's determination of pre-sentence incarceration credit;

(16) the sentence imposed by the court;

(17) issues raised by appellate counsel; and

(18) any potential claims of ineffective assistance of trial or appellate counsel.

~~(18)~~

(d) Defendant's *Pro Se* Petition. Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for the defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances. [**Staff Note:** Pro se is italicized in this rule, but not in 33.6. Which is preferred?]

(e) Counsel's Duties after Filing a Notice ~~under~~ Under Section (c). After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the post-conviction proceeding.

(f) Attorney-Client Privilege. By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim, as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

~~PROPOSED~~ COMMENT TO RULE 32.6(b)

The standard in this rule for pre-petition discovery is derived from Rule 15.1(g).

~~PROPOSED~~ COMMENT TO RULE 32.6(c)

Rule 32.6(c) is intended to assist counsel in reviewing the record to ensure that substantial justice is done. ~~Failure to complete Form 25(b), or to identify any issues listed in Rules 32.6(c) does not constitute a *per se* deviation from prevailing professional norms.~~ *See Strickland v. Washington*, 466 U.S. 668 (1984).

STAFF NOTE: The preceding sentence was deleted pursuant to a note from Mr. Steinfeld, which responded to staff's inquiry about the absence of a "no colorable claim" form for non-pleading defendants. His note said "This form was only intended for pleading defendants. There is no different form for non-pleading defendants. The goal of this form was to 1) make it as easy as possible for the Courts to see that the plea proceeding complied with the Rules and 2) make sure the attorney went through the process of checking the adequacy of the change of plea. If it made it into our split rule regarding non-pleading defendants, we should eliminate it. I don't believe there is any different form that I would come up with for non-pleading defendants. Unlike plea proceedings, there really isn't a clean fill-in-the-blank checklist that we can produce for trials; the issues are more malleable. I believe what we included in the Notice of Compliance requirements for non-pleading defendants is sufficient and does a better job of helping attorneys key in on the issues they should be identifying while recognizing the issues are not as clear cut. The list is also more comprehensive than the list we included in the pleading defendant rule."

Rule 32.7. Petition for Post-Conviction Relief

(a) Deadlines for Filing a Petition for Post-Conviction Relief.

(1) ***Noncapital Cases.***

(A) *Generally*. In every case except those in which the defendant was sentenced to death:

(i) Appointed counsel must file a petition no later than 60 days after the date of appointment.

(ii) A self-represented defendant must file a petition no later than 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 and after considering the rights of the victim, 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.

(2) ***Capital Cases.***

(A) *Generally.* In a capital case, the defendant must file a petition no later than 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 no later than 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. For good cause and after considering the rights of the victim, the court may grant additional extensions for good cause.

(b) 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 citations to relevant portions of the record and to relevant legal authorities.

(c) Length of Petition.

(1) *Non-Capital Cases.* In noncapital cases, the petition must not exceed 28 pages.

(2) *Capital Cases.* In capital cases, the petition must not exceed 160 pages.

(d) Declaration. A petition by a self-represented defendant must include a 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)**~~ **STAFF NOTE: Does the recommended form of declaration allow the defendant to identify facts within the defendant's knowledge, or is the statement in this section merely a recital? Current Form 25 [as well as the proposed revised Form 25] simply state above the defendant's signature that "I declare under penalty of perjury that the information contained in this form and in any attachments is true to the best of my knowledge and belief." [Also note that the current form says "knowledge or belief."]**

(e) Attachments. The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.

(f) 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 40 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 40 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.

~~(f)~~ **STAFF NOTE: Does section (f) apply to section (e)? If the court does not return to the defendant a petition that lacks attachments, should section (e) be modified to state the consequence of not including sufficient attachments?**

Rule 32.8. Transcript Preparation

(a) Request for Transcripts. If the verbal record of trial court proceedings ~~were~~ was not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request.

(b) Order Regarding Transcripts. 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 has specified in the notice.

(c) Deadlines. The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no later than 60 days after the entry of an order granting the defendant's request for transcripts.

(d) Cost. If the defendant is indigent, the transcripts must be prepared at county expense.

(e) Unavailability of Transcripts. If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 32.9. Response and Reply; Amendments

(a) State's Response.

(1) ***Deadlines.*** The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional

extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.

(2) ***Contents.*** The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

(b) Defendant's Reply. The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.

(c) Length of Response and Reply.

(1) ***Non-Capital Cases.*** In noncapital cases, the State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.

(2) ***Capital Cases.*** In capital cases, the State's response must not exceed 160 pages, and defendant's reply must not exceed 80 pages.

(d) Amending the Petition. After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 32.10. Assignment of a Judge

(a) Generally. The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. The provisions of Rules 10.1 and 10.2 apply in proceedings for post-conviction relief when the case is assigned to a new judge.

(b) Dispute Regarding Public Records. The assigned judge may hear and decide a dispute within its jurisdiction, whether the dispute is raised by motion or by special action, which concerns access to public records requested for a post-conviction proceeding.

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

(a) 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.

(b) Setting a Hearing. If the court does not summarily dismiss the petition, it must set a status conference or a hearing within 30 days.

(c) Notice to Victim. If the court sets a hearing, 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.

(d) Defendant's Competence. The court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim.

Rule 32.12. 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 no later than 90 days after counsel is appointed on the first notice requesting post-conviction relief.

(c) The Defendant's Presence. The defendant need not be present at an informal conference if defense counsel is present.

Rule 32.13. Evidentiary Hearing

(a) Generally. 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 to criminal proceedings apply at the hearing, except that the defendant may be called to testify.

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

(2) ***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 32.14. Motion for Rehearing

(a) Timing and Content. No later than 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.

(b) 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 no later than 10 days after the response is served.

(c) Stay. The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court.

(d) Effect on Appellate Rights. Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 32.16.

(e) 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.

~~**(e)**~~ **STAFF NOTE: The words "in either case" should not apply to, and therefore should not follow, the words "reaffirm its previous ruling." Suggest that the sentence say, "The court must state its reasons for amending its previous ruling."**

Rule 32.15. Notification to the Appellate Court

If an appeal of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must send to the appellate court within 10 days after the ruling is filed any trial court rulings granting or denying

relief on the defendant's notice or petition for post-conviction relief, or any motion for rehearing.

STAFF NOTE: This long sentence should be clarified.

Rule 32.16. Petition and Cross-Petition for Review

(a) Time and Place for Filing.

(1) ***Petition.*** No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, or the dismissal of a notice, an aggrieved party may petition the appropriate appellate court for review of the decision.

(2) ***Cross-Petition.*** The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.

(3) ***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.

(4) ***Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.***

(A) A party may seek an extension of time for filing the petition or cross-petition for review by filing a motion with the trial court, which must decide the motion promptly.

(B) If the time for filing the petition or cross-petition for review has expired, the party may request the trial court's permission to file a delayed petition or cross-petition for review. If the court grants the request to file a delayed petition or cross-petition for review, the court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

(b) Notice of Filing and Additional Record Designation. No later than 3 days after a petition or cross-petition for review is filed, the petitioner or 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 section (j). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.13(e), or that were otherwise available to the trial court and the parties~~;~~ and are material to the issues raised in the petition or cross-petition for review.

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

(1) ***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(b). 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 appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings. However, a petition for review and a response to a petition for review in a capital case must not exceed 12,000 words or 50 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

~~(1)~~ **STAFF NOTE: Because 22 handwritten pages are the equivalent of 6,000 words, 12,000 words should equal 44 handwritten pages, not 50. This is consistent with Rule 1.6(b)(1)(E): one typed page = 280 handwritten words [280 words/page times 44 pages = 12,320 words].**

(2) ***Contents.*** A petition or cross-petition for review must contain:

(A) copies of the trial court's rulings entered under Rules 32.2, 32.11, 32.13, and 32.14;

(B) a statement of issues the trial court decided that the defendant is presenting for appellate review;

(C) a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and

(D) reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

(3) ***Effect of a Motion for Rehearing.*** The filing of a motion for rehearing under Rule 32.14 does not limit the issues a party may raise in a petition or cross-petition for review.

(4) ***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.

(d) Appendix Accompanying a Petition or Cross-Petition. 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. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.

(e) Service of a Petition for Review, Cross-Petition for Review, Reply, or Related Filing. A party filing a petition, cross-petition, appendix, response, or reply, or another 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.

(f) Response to a Petition or Cross-Petition for Review; Reply.

(1) ***Time and Place for Filing a Response; Extensions of Time.***

(A) No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate court. Rule 31.3(d) governs computation of the deadline for filing the response.

(B) A party may file a motion with the appellate court for an extension of the time to file a response or reply in accordance with Rule 31.3(e).

(2) ***Form and Length of Response.*** The response must not exceed 6,000 words if typed and 22 pages if handwritten, exclusive of an appendix, and must comply with the form requirements in subpart (c)(1). An appendix to a response must comply with the form and substantive requirements in section (d).

(3) ***Reply.*** No later than 10 days after a response is served, a party may file a reply. The reply is limited to matters addressed in the response and may not exceed 3,000 words if typed and 11 pages if handwritten. It also must comply with the requirements in subpart (c)(1) and may not include an appendix.

(g) Computing and Modifying Appellate Court Deadlines. Except as otherwise provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in this rule. An appellate court may modify any deadline in accordance with Rule 31.3(e).

(h) Amicus Curiae. Rules 31.13(a)(7) and 31.15 govern filing and responding to an amicus curiae brief.

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

(j) Transmitting the Record to the Appellate Court. No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record to the appellate court. 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~~ responses, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, any exhibits admitted by the trial court in the post-conviction proceedings, and any documents or transcripts designed under section (b).

(k) Disposition. The appellate court may grant review of the petition and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper.

(l) Reconsideration or Review of an Appellate Court Decision. The provisions in Rules 31.20 and 31.21 relating to motions for reconsideration and petitions for review in criminal appeals govern motions for reconsideration and petitions for review of an appellate court decision entered under section (k).

(m) Return of the Record. After a petition for review is resolved [after the disposition of the petition for review? [see section k], the appellate clerk must return the record to the trial court clerk.

(n) Notice to the Victim. Upon the victim's request, the State must notify the victim of any action taken by the appellate court.

Rule 32.17. 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; **STAFF NOTE: Does "the State" include a law enforcement agency within the definition provided in Rule 1.4(g)?**

(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(b)(4). The State must respond to the petition no later than 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) ***DNA 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 the defendant's verdict or sentence would have been more favorable if DNA testing would produce exculpatory evidence;

(B) the evidence is still in existence; 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) ***Laboratory; Costs.*** If the court orders testing, the court must select an accredited laboratory to conduct the testing. The court may require the defendant to pay the costs of testing. **STAFF NOTE: Should this also say, unless the defendant is indigent?**

(3) ***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. **STAFF NOTE: Should there be a sanction for negligent destruction of evidence?**

(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 **STAFF NOTE: include the DPS database?**

(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 32.18. Stay of Execution of a Death Sentence on a Successive Petition

If a defendant has been sentenced to death and the Supreme Court has fixed the time for executing the sentence, the superior 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.

Rules 32.19. Review of an Intellectual Disability Determination in Capital Cases

No later than 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 any issue raised.

Rule 32.20. Extensions of Time in a Capital Case; 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 to the victim or whether it should go to another person, including the prosecutor, and whether service of the notice should 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 no later than 24 hours after filing the request.

(2) ***Service Through the Prosecutor.*** If the victim has not specified a method of service or if the victim has requested service through the prosecutor, the party requesting the extension of time must serve the prosecutor's office handling the post-conviction proceeding. If the prosecutor has the duty to notify the victim on behalf of the defendant, the prosecutor must do so no later than 24 hours after receiving the request.

~~(2)~~ STAFF NOTE: Subparts (1) and (2) may conflict. (1) says that if the victim has not specified the manner of service, it should be by regular mail. (2) says if the victim has not specified a method of service, service should be through the prosecutor's office.

(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 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 33. Post-Conviction Relief for a Defendant Who Pled Guilty or Admitted a Probation Violation

Rule 33.1. Scope of Remedy

Generally. A defendant may file a notice requesting post-conviction relief under this rule if the defendant pled guilty or no contest, admitted a probation violation, or had an automatic probation violation based on a plea of guilty or no contest.

To challenge the effectiveness of counsel in the first post-conviction proceeding, a defendant may file a second notice requesting post-conviction relief under this rule.

No Filing Fee. There is no fee for filing a notice of post-conviction relief.

Grounds for Relief. Grounds for relief are:

(a) the defendant's plea or admission to a probation violation was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions;

(b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;

(c) the sentence, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law or by the plea agreement;

(d) the defendant continues to be or will continue to be in custody after his or her sentence expired;

(e) newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. Newly discovered material facts exist if:

(1) the facts were discovered after 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 such critical significance that the impeachment evidence probably would have changed the judgment or sentence.

(f) the failure to timely file a notice of post-conviction relief was not the defendant's fault; **STAFF NOTE: Should this apply to (a) claims only? Under 33.4(b)(3), there does not appear to be a time restriction on (b) through (h) claims, hence for those claims, there cannot be a "failure to timely file a notice." And there is no provision under that rule for excusing an**

untimely (b) through (h) claim -- because a "reasonable time" should take into consideration any delay that was not the defendant's fault.

(g) there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment 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 of the offense beyond a reasonable doubt.

STAFF NOTE: The Task Force analysis [Appendix A-4 to the rule petition] said,

"Proposed Rule 33.1(h), like its Rule 32.1(h) counterpart, would afford relief if "the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt." However, this may misconstrue the application of Rule 33.1(h) in cases involving pleading defendants. The Task Force might modify this provision to require clear and convincing evidence that the defendant is actually innocent."

~~**(h)**~~ See also the comment to Rule 33.2(a)(1) below concerning the waiver of non-jurisdictional defects and defenses when entering a guilty plea.

COMMENT

Rule 33. l(a). This provision encompasses most traditional post-conviction claims, such as the denial of counsel, incompetent or ineffective counsel, or violations of other rights based on the United States or Arizona constitutions.

Rule 33.1(d). This provision is intended to include claims such as miscalculation of sentence or computation of sentence credits that result in the defendant remaining in custody when he or she should be free. It is not intended to include challenges to the conditions of imprisonment or correctional practices.

STAFF NOTE: Perhaps the comment to 33.1(d), like the comment to Rule 32.1(d), should be clarified. It refers to a claim for a miscalculation of sentence or computation of sentence credits. But 32.1(c) uses the word "computed," and the comment to (d) might appear to apply to (c) claims.

Rule 33. l(h). This claim is independent of a claim under Rule 33.1(e) concerning newly discovered evidence. A defendant who establishes a claim of

newly discovered evidence need not comply with the requirements of Rule 33.1(h).

Rule 33.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 33.1(a) based on any ground:

(1) waived by pleading guilty to the offense;

(2) finally adjudicated on the merits in any previous post-conviction proceeding;

(3) waived in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded.

(1) ***Generally.*** Claims for relief based on Rule 33.1(b) through (h) are not subject to preclusion under Rule 33.2(a). However, when a defendant raises a claim that falls under Rule 33.l(b) through (h) in a successive or untimely post-conviction notice, the defendant must 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 provide reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

~~(1)~~ STAFF NOTE: See the note under 32.2(b).

(2) ***Ineffective Assistance of Post-Conviction Counsel.*** A defendant is not precluded from filing a timely second notice requesting post-conviction relief claiming ineffective assistance of counsel in the first Rule 33 post-conviction proceeding.

~~[NEW]~~ COMMENT TO RULE 33.2(a)(1)

A pleading defendant waives all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the acceptance or validity of the plea. This provision is not intended to expand or contract what is waived by the entry of a plea under current case law.

Rule 33.3. 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 replaces and incorporates all trial court post-plea remedies except those obtainable by Rule 24 motions and habeas corpus.

(b) Other Applications or Requests for Relief. If a court receives any type of application or request for relief—however titled—that challenges the validity of the defendant's plea or admission of a probation violation, or a sentence following entry of a plea or admission of a probation violation, it must treat the application as a petition for post-conviction relief. If that court is not the court that sentenced the defendant, it must transfer the application or request for relief to the court where the defendant was sentenced.

COMMENT

This rule provides that all Rule 33 proceedings 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 33 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., which provides a remedy for individuals who are unlawfully committed, detained, confined or restrained. But if a convicted defendant files a petition for a writ of habeas corpus (or an application with a different title) that seeks relief available under Rule 33, the petition or application will be treated as a petition for post-conviction relief.

This rule does not limit remedies that are available under Rule 24.

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

(a) Generally. A defendant starts a Rule 33 proceeding by filing a Notice Requesting Post-Conviction Relief.

(b) Notice Requesting Post-Conviction Relief.

(1) ***Where to File; Forms.*** The defendant must file a notice requesting post-conviction relief under Rule 33 in the court where the defendant was sentenced. The court must make "notice" forms available for defendants.

(2) ***Content of the Notice.*** The notice must contain the caption of the original criminal case or cases to which it pertains, and all information shown in Rule 41, Form ~~—.~~24(b).

(3) ***Time for Filing.***

(A) *Claims Under Rule 33.1(a).* A defendant must file the notice for a claim under Rule 33.1(a) within 90 days after the oral pronouncement of sentence.

(B) *Claims Under Rules 33.1(b) through (h).* A defendant must file the notice for a claim under Rules 33.1(b) through (h) within a reasonable time after discovering the basis for the claim.

(C) *Successive Notice for Claims of Ineffective Assistance of Rule 33 counsel.* A defendant may raise a claim of ineffective assistance of Rule 33 counsel in a successive Rule 33 proceeding if the defendant files a notice no later than 30 days after the trial court's final order in the first post-conviction proceeding, or, if the defendant seeks appellate review of that order, no later than 30 days after the appellate court issues its mandate in that proceeding.

(D) *Excusing an Untimely Notice.* The court must excuse an untimely notice of post-conviction relief filed under subpart (3)(A) or (3)(C) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault.

(4) ***Duty of the Clerk upon Receiving a Notice.***

(A) *Superior court.* Upon receiving a notice, the superior court clerk must file it in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, defense counsel, the prosecuting attorney's office, and the Attorney General. The clerk must note in the record the date and manner of sending copies of the notice.

(B) *Justice or Municipal Court.* If the conviction occurred in a limited jurisdiction court, upon receiving a notice from a defendant, the limited jurisdiction court clerk must send a copy of the notice to the prosecuting attorney who represented the State at trial, and to defendant's counsel or the defendant, if self-represented. The clerk must note in the record the date and manner of sending copies of the notice.

(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.

PROPOSED COMMENT TO RULE 33.4(a)

A Notice of Post-Conviction Relief informs the trial court of a possible need to appoint an attorney for the defendant under Rule 33.5(a). The Notice of Post-Conviction Relief also assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

Rule 33.5. Appointment of Counsel

(a) Generally. No later than 15 days after the defendant has filed a timely or first notice under Rule 33.4, or a notice under Rule 33.4(b)(3)(C), the presiding judge must appoint counsel for the defendant if:

(1) the defendant requests it;

(2) the defendant is entitled to an appointed counsel under Rule 6.1(b); and

(3) there has been a previous determination that the defendant is indigent, or the defendant has completed an affidavit of indigency

(4) and the court finds that the defendant is indigent.

Upon filing of all other Rule 33 notices, the presiding judge may appoint counsel for an indigent defendant if requested.

(b) Appointment of Investigators, Expert Witnesses, and Mitigation Specialists. On application and if the trial court finds that such assistance is reasonably necessary for an indigent defendant, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7 at county expense.

(c) Attorney-Client Privilege and Confidentiality for the Defendant. The defendant's prior counsel must share all files and other communications with post-conviction counsel. This sharing of information does not waive the attorney-client privilege or confidentiality claims.

Rule 33.6. Duty of Counsel; Defendant's Pro Se Petition; Waiver of Attorney-Client Privilege

(a) Generally. In a Rule 33 proceeding, counsel must investigate the defendant's case for any colorable claims.

(b) Discovery.

(1) ***After Filing a Notice.*** After the filing of a notice, the court upon a showing of substantial need for the material or information to prepare the defendant's case may enter an order allowing discovery. To show substantial need, the defendant must demonstrate that the defendant cannot obtain the substantial equivalent by other means without undue hardship.

(2) ***After Filing a Petition.*** After the filing of a petition, the court may allow discovery for good cause. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim.

STAFF NOTE: Subpart (2) includes a "materiality" requirement. Should subpart (1) also include that requirement?

~~**(2)**~~

(c) Counsel's Notice of No Colorable Claims. If counsel determines there are no colorable claims, counsel must file a notice advising the court of this determination, and promptly provide a copy of the notice to the defendant. The notice must include or list:

(1) a summary of the facts and procedural history of the case;

(2) the specific materials that counsel reviewed;

(3) the date counsel provided the record to the defendant, and the contents of that record;

(4) the dates counsel discussed the case with the defendant;

(5) the charges and allegations presented in the complaint, information, or indictment;

In the notice, counsel should also identify the following:

(6) any potential errors related to the entry of the plea for which there were no objections, but which might rise to the level of fundamental error;

(7) any determination of the defendant's competency that was raised prior to sentencing;

(8) any objections raised at the time of sentencing;

(9) the court's determination of the classification and category of offenses for which the defendant was sentenced under the plea agreement;

(10) the court's determination of pre-sentence incarceration credit;

(11) the sentence imposed by the court; and

(12) any potential claims of ineffective assistance of counsel.

A notice of no colorable claims must also include or incorporate Form ~~—~~ 25(b), with citations to the pertinent portions of the record.

(d) Defendant's Pro Se Petition. Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

(e) Counsel's Duties After Filing a Notice Under Section (c). After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the post-conviction proceeding.

(f) Attorney-Client Privilege. By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

PROPOSED COMMENT TO RULE 33.6(c)

Rule 33.6(c) is intended to assist counsel in reviewing the record to ensure that substantial justice is done. Failure to complete Form ~~—~~ 25(b), or identify any issues listed in Rules 33.6(c) does not constitute a *per se* deviation from prevailing professional norms to the extent a pleading defendant possesses a right to effective post-conviction counsel under Arizona law. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Rule 33.7. Petition for Post-Conviction Relief

(a) Deadlines for Filing a Petition for Post-Conviction Relief.

(1) ***Defendant with Counsel***. Appointed counsel must file a petition no later than 60 days after the date of appointment.

(2) ***Self-Represented Defendant.*** A self-represented defendant must file a petition no later than 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

(3) ***Time Extensions.*** For good cause and after considering the rights of the victim, the court may grant a defendant a 30-day extension to file the

petition. The court may grant additional 30-day extensions only on a showing of extraordinary circumstances.

(b) 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 citations to relevant portions of the record and to relevant legal authorities.

(c) Length of Petition. The petition must not exceed 28 pages.

(d) Declaration. A petition by a self-represented defendant must include a 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. **STAFF NOTE: See the note under 32.7(d).**

(e) Attachments. The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.

(f) Effects 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 40 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 40 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. **STAFF NOTE: See the note under 32.7(f).**

Rule 33.8. Transcription Preparation

(a) Request for Transcripts. If the verbal record of trial court proceedings ~~were~~ was not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request.

(b) Orders Regarding Transcripts. 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 has specified in the notice.

(c) Deadlines. The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no later than 60 days after the entry of an order granting the defendant's request for transcripts.

(d) Cost. If the defendant is indigent, the transcripts must be prepared at county expense.

(e) Unavailability of Transcripts. If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

(1) ***Deadlines.*** The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.

(2) ***Contents.*** The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

(b) Defendant's Reply. The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.

(c) Length of Response and Reply. The State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.

(d) Amending the Petition. After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 33.10. Assignment of a Judge

(a) Generally. The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. The provisions of Rules 10.1 and 10.2 apply in proceedings for post-conviction relief when the case is assigned to a new judge.

(b) Dispute Regarding Public Records. The assigned judge may hear and decide a dispute within its jurisdiction, whether the dispute is raised by motion or by special action, which concerns access to public records requested for a post-conviction proceeding.

Rule 33.11. Court Review of the Petition, Response, and Reply; Further Proceedings

(a) 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.

(b) Setting a Hearing. If the court does not summarily dismiss the petition, it must set a status conference or a hearing within 30 days.

(c) Notice to the Victim. If the court sets a hearing, 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.

(d) Defendant's Competence. The court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim.

Rule 33.12. Informal Conference

(a) Generally. At any time, the court may hold an informal conference to expedite a proceeding for post-conviction relief.

(b) The Defendant's Presence. The defendant need not be present at an informal conference if defense counsel is present.

Rule 33.13. Evidentiary Hearing

(a) Generally. 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 to criminal proceedings apply at the hearing, except that the defendant may be called to testify.

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

(2) ***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 setting the matter for 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 33.14. Motion for Rehearing

(a) Timing and Content. No later than 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.

(b) 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 no later than 10 days after the response is served.

(c) Stay. The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court. **STAFF NOTE: Is this section correct, i.e., does the court enter an order granting a new trial when there was never a first trial?**

(d) Effect on Appellate Rights. Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 33.16.

(e) 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.

Rule 33.15. Notification to the Appellate Court

If a petition for review of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must file in the appellate court a notice of any relief granted or denied by the trial court. **STAFF NOTE: Rule 32.15 includes a 10-day requirement for providing this notice.]**

Rule 33.16. Petition and Cross-Petition for Review

(a) Time and Place for Filing.

(1) ***Petition.*** No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, or the dismissal of a notice, an aggrieved party may petition the appropriate appellate court for review of the decision.

(2) ***Cross-Petition.*** The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.

(3) ***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.

(4) ***Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.*** A party may seek an extension of time for filing the petition or cross-petition for review by filing a motion with the trial court, which must decide the motion promptly. If the time for filing the petition or cross-petition for review has expired, the party may request the trial court's permission to file a delayed petition or cross-petition for review. If the court grants the request to file a delayed petition or cross-petition for review, the court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date. **STAFF NOTE: The corresponding provision in Rule 32.16 breaks the foregoing provision into two subparts. Both rules should be uniform in this regard.**

(b) Notice of Filing and Additional Record Designation. No later than 3 days after a petition or cross-petition for review is filed, the petitioner or 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 section (i). These items may include additional certified transcripts of trial court proceedings prepared under Rule 33.13(e), or that were otherwise available to the trial court and the parties~~;~~ and are material to the issues raised in the petition or cross-petition for review.

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

(1) ***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(b). 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 appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

(2) ***Contents.*** A petition or cross-petition for review must contain:

(A) copies of the trial court's rulings entered under Rules 33.2, 33.11, 33.13, and 33.14;

(B) a statement of issues the trial court decided that the defendant is presenting for appellate review;

(C) a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and

(D) reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

(3) ***Effect of a Motion Rehearing.*** The filing of a motion for rehearing under Rule 33.14 does not limit the issues a party may raise in a petition or cross-petition for review.

(4) ***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.

(d) Appendix Accompanying a Petition or Cross-Petition. 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. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.

(e) Service of a Petition for Review, Cross-Petition for Review, Reply, or Related Filing. A party filing a petition, cross-petition, appendix, response, or reply, or another 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.

(f) Response to a Petition or Cross-Petition for Review; Reply.

(1) ***Time and Place for Filing a Response; Extensions of Time.***

(A) No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate court. Rule 31.3(d) governs computation of the deadline for filing the response.

(B) A party may file a motion with the appellate court for an extension of the time to file a response or reply in accordance with Rule 31.3(e).

(2) ***Form and Length of Response.*** The response must not exceed 6,000 words if typed and 22 pages if handwritten, exclusive of an appendix, and must comply with the form requirements in subpart (c)(1) An appendix to a response must comply with the form and substantive requirements in section (d).

(3) ***Reply.*** No later than 10 days after a response is served, a party may file a reply. The reply is limited to matters addressed in the response and may not exceed 3,000 words if typed and 11 pages if handwritten. It also must comply with the requirements in subpart (c)(~~2~~1) and may not include an appendix. [Is this reference correct?]

(g) Computing and Modifying Appellate Court Deadlines. Except as otherwise provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in this rule. An appellate court may modify any deadline in accordance with Rule 31.3(e).

(h) Amicus Curiae. Rules 31.13(a)(7) and 31.15 govern filing and responding to an amicus curiae brief.

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

(j) Transmitting the Record to the Appellate Court. No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record to the appellate court.~~.~~ 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~~ responses, all minute entries and orders issued in

the post-conviction proceedings, transcripts filed in the trial court, any exhibits admitted by the trial court in the post-conviction proceedings, and any documents or transcripts designed under section (b).

(k) Disposition. The appellate court may grant review of the petition and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper.

(l) Reconsideration or Review of an Appellate Court Decision. The provisions in Rules 31.20 and 31.21 relating to motions for reconsideration and petitions for review in criminal appeals govern motions for reconsideration and petitions for review of an appellate court decision entered under section (k).

(m) Return of the Record. After a petition for review is resolved (after the disposition of the petition for review? [see section k]), the appellate clerk must return the record to the trial court clerk.

(n) Notice to the Victim. Upon the victim's request, the State must notify the victim of any action taken by the appellate court.

Rule 33.17. 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; **STAFF NOTE: Does "the State" include a law enforcement agency within the definition provided in Rule 1.4(g)? See other notes under 32.17.**

(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 33.4(b)(4). The State must respond to the petition no later than 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) ***DNA 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 the defendant's verdict or sentence would have been more favorable if DNA testing would produce exculpatory evidence;

(B) the evidence is still in existence; 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) ***Laboratory; Costs.*** If the court orders testing, the court must select an accredited laboratory to conduct the testing. The court may require the defendant to pay the costs of testing. **STAFF NOTE: Should this also say, unless the defendant is indigent?**

(3) ***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. **STAFF NOTE: Should there be a sanction for negligent destruction of evidence?**

(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 or Rule 33.1. 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 **STAFF NOTE: include the DPS database?**

(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 33.1 as a matter of law.

Details and Analysis of the Proposed Revisions to Rules 32 and 33

The Task Force proposes the deletion of all comments to current Rule 32, except as noted below.

Rule 32.1. Scope of Remedy

Proposed Rule 32.1 is perhaps the most significant rule because it establishes a foundation for the subsequent rules.

The Task Force retained the title of the current rule. However, it changed two of the three introductory section headings. (The proposed rule, like the current rule, does not have letter designations for these three introductory sections.)

The Task Force changed "petition for relief" to "generally" because neither the current nor the proposed provision mentions a petition. Instead, the provisions refer to a notice. The Task Force changed the nomenclature of the notice from the current "notice of post-conviction relief," to a more accurate "notice requesting post-conviction relief." This modified term is used throughout the rules. See further the discussion of proposed Rule 32.4 below. In addition, proposed Rule 32.1 no longer begins with the words "subject to Rules 32.2 [preclusion] and 32.4(a)(2) [time for filing a notice]" because while those provisions may ultimately bar relief, neither of those provisions preempts a defendant from filing a notice. Most importantly, although the current provision allows a defendant "convicted of, or sentenced for, a criminal offense" to file a notice, proposed Rule 32.1 allows a defendant to file a notice only "if the defendant was convicted and sentenced for a criminal offense after a trial or a contested probation violation hearing, or in any case in which the defendant was sentenced to death." Other circumstances that allow a defendant to file a notice requesting post-conviction relief are described in Rule 33.1 below.

Proposed Rule 32.1 deleted the title of the second section, now titled "of-right petition," because (1) the proposed rules no longer use that term, and (2) the concept of an of-right petition is now contained in proposed Rule 33. The Task Force added a new second subsection, "no filing fee," which is derived from the first section of the current rule.

The title of the third section, "grounds for relief," remains the same.

Grounds for relief are specified as sections (a) through (h). These letter designations are unchanged.

(a) Section (a) of the proposed rule (concerning constitutional violations) added two offsetting commas, but otherwise the provision is identical to the current one. Section (a) is the ground for relief most often requested in post-conviction petitions. Claims of ineffective assistance of counsel are asserted under this section.

(b) Section (b) of the proposed rule added the words "subject matter" before the word "jurisdiction" to clarify that it is a lack of subject matter jurisdiction, which cannot be waived, rather than a lack of personal jurisdiction, which can be waived, that gives rise to a claim for post-conviction relief.

(c) Section (c) of the proposed rule is significantly different than the current rule. The current rule provides relief if "the sentence imposed exceeds the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law." The Task Force believed a sentence "that exceeds the maximum authorized by law" is also "not in accordance with the sentence authorized by law," and therefore the former provision is unnecessary.

Furthermore, the Task Force discussed recurring situations where the sentence imposed by the court accorded with the law, but the sentence was subsequently recomputed by the Department of Corrections in a manner that deviated from the court's sentence. Its proposed rule attempts to address these situations by providing, "the sentence, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law."

(d) Section (d) of the current rule provides that the defendant "continues to be in custody after his or her sentence expired." The proposed rule adds the terms, "or will continue to be," to permit a defendant to seek relief before the alleged expiration of the sentence.

(e) Section (e) of the proposed rule concerning newly discovered evidence is identical to the current rule except that the word "judgment" replaces the word "verdict."

(f) Current section (f) refers to a defendant who failed to file a timely "of-right" notice of post-conviction relief or a notice of appeal within the required time. The proposed version limits relief to the failure to timely file a notice of appeal, eliminating the pleading defendant's right to seek relief for failing to file a timely "of-right" notice of post-conviction relief. Proposed Rule 33 applies to that defendant. Under the proposed rule, the non-pleading defendant who fails to file a timely notice raising a claim under Rule 32.1(a), may ask the trial court to excuse the untimeliness pursuant to proposed Rule 32.4(b)(3). A notice raising claims under Rule 32.1(b) through (h) can be filed under proposed Rule 32.4(b)(3) "within a reasonable time after discovering the basis of the claim," so there is no per se untimeliness.

(g) The Task Force proposes a change to the wording of current Rule 32.1(g), which concerns a significant change in the law. The current rule says, "if applied to the defendant's case." The proposed rule says, "if applicable to the defendant's case," which the Task Force believes is more precise. Additionally, the word "judgment" replaces "conviction."

(h) To clarify that this provision applies to an individual offense rather than to an entire case if there are multiple offenses, the Task Force's proposed version of this provision adds the words "of the offense" after the word "guilty." The Task Force also proposes a change to the portion of the rule dealing with a death sentence, which is discussed more extensively in the body of the rule petition.

Comment: The Task Force restyled the existing comment. Throughout the comment, it changed the word "attack" to "challenge." In the section (a) comment, "traditional collateral attacks" in the current comment would become "traditional post-conviction claims" in the proposed version. Also, the words "or ineffective" were inserted between the words "incompetent counsel." The phrase "federal or Arizona constitutions" in the current comment to section (a) was changed to "United States or Arizona constitutions," which is the phrase used in the body of the rule. The Task Force would delete the comments to sections (b), (c), and (f) as either inaccurate, incomplete, or not useful.

Rule 33.1. Scope of Remedy

Proposed Rule 33.1 parallels proposed Rule 32.1 except as noted below.

First, in the "generally" section of proposed Rule 33.1, a defendant may file a notice "if the defendant pled guilty or no contest, admitted a probation violation, or had an automatic probation violation based on a plea of guilty or no contest." This compares with proposed Rule 32.1, which permits the filing of a notice after a trial or a probation violation hearing. Defendants who would file under proposed Rule 33 are currently referred to as "pleading defendants," a term that no longer appears in the proposed rules.

Although proposed Rule 33.1 eliminates the term, "of-right," the "generally" section of proposed Rule 33.1 retains the portion of the current rule that allows a defendant to file a second notice requesting post-conviction relief to challenge the effectiveness of counsel in the first post-conviction proceeding.

Grounds for relief:

(a) Unlike proposed Rule 32.1, which affords a defendant relief if the conviction was obtained or sentence was imposed in violation of the constitution, proposed Rule 33.1 allows relief if "the defendant's plea or admission to a probation violation" was so obtained. It includes similar sentencing relief as well.

(b) This subsection mirrors proposed Rule 32.1(b), adding "subject matter" before "jurisdiction."

(c) Like proposed Rule 32.1(c), proposed Rule 33.1(c) provides relief if the sentence imposed by the judge or as computed by the Arizona Department of Corrections was not authorized by law. However, proposed Rule 33.1(c) adds, "or by the plea agreement." This phrase would allow a defendant to enforce the terms of a plea bargain if the sentence deviated from the plea agreement.

(f) Whereas proposed Rule 32.1(f) provides relief for an untimely notice of appeal, proposed Rule 33.1(f) offers relief for the untimely filing of a notice of post-conviction relief. Proposed Rule 33.1 and other provisions in the Rule 33 series presume that a defendant who pled guilty or admitted a probation violation (a "pleading defendant") had no appeal because a direct appeal is not available to such defendants. See further Criminal Rule 17.1(e), which provides, "By pleading guilty or no contest in a noncapital case, a defendant waives the right to have the appellate courts review the proceedings on a direct appeal. A defendant who pleads guilty or no contest may seek review only by filing a petition for post-conviction relief under Rule 32 and, if it is denied, a petition for review." See also A.R.S. § 13-4033(B) ("In non-capital cases a defendant may not appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation.").

(h) Proposed Rule 33.1(h), like its Rule 32.1(h) counterpart, would afford relief if "the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt." However, this may misconstrue the application of Rule 33.1(h) in cases involving pleading defendants. The Task Force might modify this provision to require clear and convincing evidence that the defendant is actually innocent.

Rule 32.2. Preclusion of Remedy

Proposed Rule 32.2(a) ("preclusion") is similar to current Rule 32.2, except that the third specified ground ("waived at trial or on appeal, or in a previous collateral proceeding")

(1) changes the phrase "collateral proceeding" in Rule 32.2(a)(2) and (3) to "post-conviction proceeding"; and,

(2) adds the following language: "except when the claim raises a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." This additional language is based on case law regarding claims of "sufficient constitutional magnitude" that cannot be deemed waived by inference.

Current Rule 32.2(b) relates to "exceptions to preclusion" and is referred to in the proposed subsection as "claims not precluded." The exceptions to preclusion have been expanded —from (d) through (h) in the current rule, to (b) through (h) as proposed. In other words, the only ground that remains subject to preclusion under Rule 32.2(a) are those that fall under Rule 32.1(a). However, if a defendant raises a claim under (b) through (h) in a successive or untimely notice, the notice must explain the reasons for not previously or timely raising it.

The first sentence of current section (c) ("standard of proof"), concerning the duty of the State to plead and prove preclusion, has been relocated to proposed Rule 32.9(a)(2), which deals with the contents of the State's response to the petition. The second sentence of current section (c), which permits the court to determine that an issue is precluded even when preclusion is not raised by the State, is now located in proposed Rule 32.2(b). It has been reworded to incorporate the standard of proof, which is a preponderance of the evidence, and allows the court to find a claim precluded even if the State does not raise it.

Rule 33.2. Preclusion of Remedy

Proposed Rule 33.2 is similar to proposed Rule 32.2. However, whereas proposed Rule 32.2(a)(1) precludes relief on a ground still raisable on appeal or under Rule 24, proposed Rule 33.2(a)(1) precludes relief on any ground "waived by pleading guilty to the offense." Because a pleading defendant will not have an appeal, proposed Rule 33.2(a)(2) and (a)(3) omit references to any ground adjudicated in an appeal or waived on appeal.

Although proposed Rule 32.2(b) states the exceptions to preclusion in a single paragraph titled "claims not precluded," proposed Rule 33.2(b) lists those exceptions in two subparts. The first subpart corresponds to the paragraph in proposed Rule 32.2(b). The second subpart, titled "ineffective assistance of post-conviction counsel," states that a defendant is not precluded from filing a timely second notice to raise a claim of ineffective assistance of counsel in the first Rule 33 proceeding. The Task Force added this to assure that the second notice, which is authorized by existing law, is not mistakenly precluded.

Comment: A new comment to proposed Rule 33.2(a)(1) explains what defenses are waived by a pleading defendant, acknowledging the general rule based on well-developed case law that a pleading defendant waives all non-jurisdictional defects and defenses.

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

Rule 32.3(a) ("generally") is similar to current Rule 32.3(a), except the proposed provision uses the phrase "replaces and incorporates" rather than "displaces and incorporates." And instead of "post-trial motions," the proposed rule uses "Rule 24 motions."

Current Rule 32.3(b) is titled "habeas corpus." Proposed Rule 32.3(b) is titled "other applications or requests for relief." The title and body of proposed section (b) omits the

Latin term "habeas corpus" and provides, "If a court receives any type of application or request for relief—however titled—," which would include petitions for writ of habeas corpus. A restyled comment to this proposed rule continues to use that term and provides context for its meaning; it is "a remedy for individuals who are unlawfully committed, detained, confined, or restrained."

Proposed Rule 32.3(c) ("defendant sentenced to death") provides that a defendant sentenced to death must proceed under proposed Rule 32, rather than proposed Rule 33, even if the defendant pled guilty to first-degree murder. This avoids multiple petitions—one petition for the guilty plea, and another petition for a penalty-phase trial—if the defendant enters a plea before the guilt phase of a capital case.

Comment: In addition to what is noted in section (b) above, the proposed comment also states that Rule 32.3 does not limit remedies that are available under Rule 24.

Rule 33.3. Nature of a Post-Conviction Proceeding and Relation to Other Remedies

Proposed Rule 33.3(a) is identical to proposed Rule 32.3(a).

However, proposed Rule 33.3(b) ("other applications or requests for relief") is different than the corresponding Rule 32.3 provision. Whereas Rule 32.3(b) refers to a challenge to the validity of the defendant's conviction and sentence after a trial, Rule 33.3(b) refers instead to a challenge "of the defendant's plea or admission of a probation violation, or a sentence following entry of a plea or admission of a probation violation." Also, Rule 32.3(b) refers to transferring the application to the court where the defendant was convicted or sentenced; Rule 33.3(b) requires transfer to the court where the defendant was sentenced.

Because a defendant sentenced to death must seek relief under proposed Rule 32, proposed Rule 33 does not contain an analog to Rule 32.3(c), which applies only to capital defendants.

Rule 32.4. Filing a Notice Requesting Post-Conviction Relief

Two general changes are noteworthy.

First, under the current rule, a defendant is directed to file a "notice <u>of</u> post-conviction relief." The Task Force believed it would be more accurate if the rule said that the defendant files a "notice <u>requesting</u> post-conviction relief."

Second, the title of current Rule 32.4 is "filing of notice and petition, and other initial proceedings." The current rule is substantively dense. The Task Force therefore divided the current rule into seven proposed rules, as follows:

> Rule 32.4 – Filing a Notice Requesting Post-Conviction Relief
>
> Rule 32.5 – Appointment of Counsel

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

Rule 32.7 – Petition for Post-Conviction Relief

Rule 32.8 – Transcript Preparation

Rule 32.10 – Assignment of a Judge

Rule 32.18 – Stay of Execution of a Death Sentence on a Successive Petition

Note also that current Rule 32.4(c) ("time for filing a petition for post-conviction relief") has been relocated to proposed Rule 32.7 (now titled, "petition for post-conviction relief") and combined with other provisions of current Rule 32.5 ("contents of a petition for post-conviction relief"). Because of that relocation, provisions concerning the contents and time for filing a petition are now contained in the same rule.

Proposed Rule 32.4 begins with a restyled section (a) consisting of a single sentence: "A defendant starts a Rule 32 proceeding by filing a Notice Requesting Post-Conviction Relief." This is straightforward and provides easy-to-understand guidance on how to begin a post-conviction proceeding.

Section (b) ("notice requesting post-conviction relief") includes subparts concerning where to file a notice and forms; the content of the notice; and, the time for filing the notice. Because proposed Rule 32 no longer applies to cases involving a plea or admission of a probation violation, the time for filing an "of right" notice or a second notice raising a claim of ineffective assistance of first post-conviction counsel is no longer in Rule 32.4, but has instead been relocated to Rule 33.4, albeit without the "of right" term. The time for filing a notice of a Rule 32.1(a) claim in proposed Rule 32.4 is essentially the same time provided by the current rule. Although current Rule 32.4 states, "within 90 days after the entry of judgment and sentence" or "within 30 days after the issuance of the final order or mandate in the direct appeal," the proposed rule provides, "within 90 days after the oral pronouncement of sentence," consistent with Rule 31.2(a), which was amended in light of *State v. Whitman*, 234 Ariz. 565 (2014).

If a defendant files an untimely notice of a claim under Rule 32.1(a), proposed Rule 32.4(b)(3)(D), gives the court discretion to excuse the untimeliness "if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." Under current Rule 32.4, there are deadlines for filing claims under Rule 32.1(a) through (c). Under the proposed rule, the deadlines would no longer apply to claims under Rule 32.1(b) and (c), as well as claims under (d) through (h). Proposed Rule 32.4(b)(3)(B) provides that claims under Rule 32.1(b) through (h) must be raised "within a reasonable time after discovering the basis of the claim."

Comment: A proposed new comment to Rule 32.4(a) explains the purpose of the notice. The comment states that the notice informs the trial court of a possible need to appoint counsel for the defendant, and it assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

Comment: The Task Force recommends retaining the current comment to Rule 32.4(a) concerning a simultaneously pending appeal.

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

Proposed Rule 33.4 is like Rule 32.4 except for the following.

As noted above, under proposed Rule 32.4(b)(3)(A), the time limit for a Rule 32.1(a) claim runs from the oral pronouncement of sentence (thereby addressing the *State v. Whitman* issue) or from the issuance of the mandate in the direct appeal. By comparison, under Rule 33.4(b)(3)(A), the time limit for a Rule 33.1(a) claim runs only from the oral pronouncement of sentence, because there should be no appeal directly after a plea.

Proposed Rule 32.4(b) includes a subpart for filing a notice in a capital case. Because Rule 33 does not apply to capital cases, it omits this subpart. However, proposed Rule 33.4 includes a subpart [(b)(3)(C)] concerning the time for filing a successive notice of a claim of ineffective assistance of counsel in the first Rule 33 proceeding. That is not in Rule 32.4 because as case law establishes, the non-pleading defendant does not have the right to raise a claim that counsel in the first Rule 32 proceeding was ineffective. See *State v. Mata*, 185 Ariz. 319, 336-37 (1996); *State v. Krum*, 183 Ariz. 288, 291-92 & n. 5 (1995); *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18 (App. 2011).

Finally, the duty of the Clerk to notify the appellate court of the filing of a notice of post-conviction relief is found only in Rule 32.4. As noted above, there is no direct appeal following a plea, and there is no need for a corresponding provision concerning this specific duty in proposed Rule 33.4.

Rule 32.5. Appointment of Counsel

Proposed Rule 32.5 is derived from current Rule 32.4(b). The proposed rule includes the two subparts of the current rule—one subpart for capital cases, and the other for non-capital cases—but it reverses the current order by placing the noncapital cases first, because non-capital cases are more common.

Proposed Rule 32.5(a) follows the current subpart by requiring the appointment of counsel in a non-capital case upon the filing of a timely or first notice requesting post-conviction relief. For all other notices, the appointment of counsel is discretionary. The current subpart concerning non-capital cases has two required factors for the appointment of counsel (i.e., the defendant requests counsel, and a finding that the defendant is indigent).

Proposed Rule 32.5(a) adds a third factor: that the defendant is entitled to appointed counsel under Rule 6.1(b). Proposed Rule 32.5(a) applies to misdemeanors as well as felonies, and there may be instances, especially with misdemeanors, where a defendant is not entitled to court-appointed counsel, even on a first or timely notice.

Proposed Rule 32.5(b) applies to capital cases and tracks the current rule, but it adds this sentence: "On application and if the trial court finds that such assistance is reasonably necessary, it must appoint co-counsel." This new sentence codifies current practices in the superior court.

Proposed Rule 32.5(c) is new. It concerns the appointment of investigators, expert witnesses, and mitigation specialists. Under Rule 6.7, the court has discretion to appoint one of these individuals, or a combination of them, at county expense.

Proposed Rule 32.5 also contains a new section (d) titled, "attorney-client privilege and confidentiality for the defendant." The provision addresses concerns regarding the duty of defendant's prior counsel to share with post-conviction counsel the defendant's file and other communications that may be privileged. This new rule affirms the duty of prior counsel to share the file and communications with post-conviction counsel and confirms that doing so does not waive the attorney-client privilege or confidentiality claims.

Rule 33.5. Appointment of Counsel

Proposed Rule 33.5 is similar to proposed Rule 32.5, except Rule 33.5 does not include a section regarding capital cases. Rule 33.5(a) ("generally") contains the three factors described in Rule 32.5(a). Proposed Rule 33.5 requires the appointment of counsel on a timely or first notice, or on a successive timely notice challenging the effectiveness of the first post-conviction counsel.

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

Proposed Rule 32.6 is based on current Rule 32.4(d). Like the current rule, the proposed rule begins with a requirement that counsel investigate the defendant's case for "any colorable claims." (The current rule uses the phrase, "any and all colorable claims," which the Task Force believes is redundant.)

The remainder of proposed Rule 32.6 departs from the current rule.

First, proposed Rule 32.6(b) contains a new provision on "discovery." Current Rule 32 has no discovery provision, and the Task Force believed that a new discovery provision would provide guidance for judges and parties when discovery is an issue in a post-conviction proceeding. Proposed Rule 32.6(b) contains two subparts. The first subpart, (b)(1), is titled, "after filing a notice." This provision would supersede *Canion v. Cole*, 210

Ariz. 598 (2005), by allowing discovery after the filing of a PCR notice but before the filing of a post-conviction petition, upon a showing of substantial need for material or information. This is the standard for a disclosure order under Rule 15.1(g). The second subpart, (b)(2), titled "after filing a petition," would allow discovery for good cause; the proposed provision includes a description of how the defendant could show good cause. The Task Force intended the standard for pre-petition discovery to be higher than the standard for post-petition discovery.

Second, proposed Rule 32.6(c) significantly expands what counsel is required to include in a "notice of no colorable claims." The notice must include five specified items (such as what counsel reviewed, and dates counsel discussed the case with the defendant). The proposed rule provides that counsel "should also identify" 13 additional items (including motions affecting the course of trial, the defendant's competency, jury issues, and post-trial motions).

Counsel's duties after filing a notice of no colorable claims, enumerated in current Rule 32(d)(2)(A), are in proposed Rule 32.6(e) and are substantively the same. Similarly, a provision on the defendant's pro se petition that is in current Rule 32.6(d)(2(B) is in proposed Rule 32.6(d) and is also substantively the same as the current rule.

Proposed Rule 32.6(f), titled "attorney-client privilege," is new. The section provides that a defendant who raises a claim of ineffective assistance of counsel waives the attorney-client privilege "as to any information necessary to allow the State to rebut the claim, as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4)."

Comment: A proposed new comment to Rule 32.6(b) advises that the standard for pre-petition discovery is derived from Rule 15.1(g).

Rule 33.6. Duty of Counsel; Defendant's Pro Se Petition; Waiver of Attorney-Client Privilege

Proposed Rule 33.6, sections (a) ("generally"), (b) ("discovery"), (d) ("defendant's pro se petition"), (e) ("counsel's duties after filing a notice under section (c)"), and (f) ("privilege") are the same as the corresponding sections of proposed Rule 32.6.

The differences between proposed Rules 32.6 and 33.6 are found in their respective sections (c) ("counsel's notice of no colorable claims"). The first five items that counsel must include in the notice are the same in both rules. Although proposed Rule 32.6(c) contains 13 addition items, proposed Rule 33.6(c) contains 7 items counsel should also identify. Those items are pertinent to a plea proceeding, but items that are relevant only to a non-pleading defendant are omitted.

Comment: Rule 33.6 includes the comment to Rule 32.6 noted above. It also includes an additional comment that refers to a proposed checklist form that counsel should use in

connection with an investigation under this rule. This comment describes the consequences of failing to complete, or deviating from, the form ("it does not constitute a per se deviation from prevailing professional norms...").

Rule 32.7. Petition for Post-Conviction Relief

Proposed Rule 32.7 is based on current Rule 32.4(c) ("time for filing a petition for post-conviction relief") and current Rule 32.5 ("contents of a petition for post-conviction relief").

To be consistent with proposed Rule 32.5, and unlike current Rule 32.4(c), the time limits in proposed Rule 32.7(a) for filing a petition in a non-capital case are located before the time limits for filing a petition in a capital case. In addition, proposed Rule 32.7(a)(1)(A) concerning noncapital cases indicates what capital case means (i.e., "except those cases in which the defendant was sentenced to death"). The number of days for each deadline in proposed Rule 32.7(a) are unchanged from the deadlines in current Rule 32.4(c).

The current provision regarding status reports to the Supreme Court has been deleted from proposed Rule 32.7(a)(2), because these reports now have limited benefit.

Proposed Rule 32.7(b) ("form of petition") mirrors current Rule 32.5(a).

In proposed Rule 32.7(c) ("length of petition"), which is based on current Rule 32.5(b), the requirements for non-capital and capital cases are provided separately and in that sequence. The current page limit for a petition in a capital case is 80 pages. The Task Force noted the inadequacy of that limit, and the need to have a limit that is more closely aligned with petitions that are currently filed in death penalty cases. Proposed Rule 32.7(c) accordingly increases the limit for petitions in capital cases to 160 pages. Page limits in current Rule 32.5(b) for responses to a petition and replies have been relocated to Rule 32.9 ("response and reply; amendments"). Proposed Rule 32.7 no longer includes the current rule's reference to of-right cases.

Proposed Rules 32.7(d) ("declaration"), (e) ("attachments"), and (f) ("effect of non-compliance") are substantively the same as current Rules 32.5 (c), (d), and (e).

Rule 33.7. Petition for Post-Conviction Relief

Proposed Rule 33.7 is similar to proposed Rule 32.7 except for the following.

The deadlines specified in proposed Rule 33.7(a) do not include a deadline for petitions in capital cases, because capital cases are governed by Rule 32. Otherwise, the deadlines in proposed Rule 32.7 are consistent with the deadlines in current Rule 32.4(c). Because there are no capital cases under Rule 33, the maximum length of a Rule 33 petition is the same as a non-capital petition under Rule 32.7: 28 pages.

Rule 32.8. Transcript Preparation

Proposed Rule 32.8 is based on current Rule 32.4(e). Proposed Rule 32.8(a) ("request for transcripts"), (b) ("order regarding transcripts"), (c) ("deadlines"), and (d) ("cost") are substantively similar to current Rule 32.4(e)(1)-(5), although certain provisions have been reorganized.

Proposed Rule 32.8(e) ("unavailability of transcripts") is new. If a transcript is unavailable, this new provision permits the parties to proceed in accordance with Criminal Rule 31.8(e) (a narrative statement) or Rule 31.8(f) (an agreed statement).

Rule 33.8. Transcript Preparation

Proposed Rule 33.8 is substantively similar to proposed Rule 32.8.

Rule 32.9. Response and Reply; Amendments

Proposed Rule 32.9 is based on current Rule 32.6. Rule 32.9(a) ("State's response") is substantively the same as current Rule 32.6(a), but it bifurcates the substance into two subparts, one concerning "deadlines" and the other concerning "contents." Rule 32.9(b) ("defendant's reply") is similar to current Rule 32.6(b).

Proposed Rule 32.9(c) ("length of response and reply") includes content taken from current Rule 32.5(b). Rule 32.9(c) is divided into two subparts, one for non-capital cases and the other for capital cases. Because proposed Rule 32.7 increases the maximum length of a petition in a capital case from 80 pages to 160 pages, and proposed Rule 32.9(c) increases the page limit for the response in a capital case from 80 pages to 160 pages and increases the page limit for the reply from 40 pages to 80 pages.

Proposed Rule 32.9(d) ("amending the petition") is similar to current Rule 32.6(c).

Current Rule 32.6(d) ("review and further proceedings") has been relocated to proposed Rule 32.11 ("court review of the petition, response, and reply; further proceedings").

Rule 33.9. Response and Reply; Amendments

The revisions in proposed Rule 33.9 mirror those in proposed Rule 32.9, with the exception that Rule 33.9 does not include references to capital cases.

Rule 32.10. Assignment of a Judge

Rule 32.10(a) ("generally") is based on current Rule 32.4(f) ("assignment of a judge"). But there are two notable changes.

First, proposed Rule 32.10(a) omits the second sentence of current Rule 32.4(f), which requires the presiding judge to reassign the case to a different judge "if the sentencing

judge's testimony will be relevant." The Task Force believed this circumstance was so rare that it did not warrant a rule provision.

The other change in proposed Rule 32.10(a) is the addition of a new second sentence, which applies the provisions of Criminal Rule 10.1 ("change of judge for cause") and Rule 10.2 ("change of judge as a matter of right") when the case is assigned to a new judge. Current Rule 32.3(a) and proposed Rule 32.3(a) both provide that "a post-conviction proceeding is part of the original criminal action and is not a separate action." Because the post-conviction proceeding is a continuation of the original action, the Task Force found no justification why Rules 10.1 and 10.2 should not have continuing applicability.

Proposed Rule 32.10 also contains a new section (b) titled, "dispute regarding public records." Public records disputes can be raised in post-conviction proceedings by a civil special action, which is assigned to a judge with a civil calendar. If the civil special action concerns access to public records requested for a post-conviction proceeding, the Task Force found no compelling reason why the judge assigned to the criminal proceeding should not resolve the dispute. This new provision would allow that, regardless of whether the issue is raised by special action or by motion.

Rule 33.10. Assignment of a Judge

Proposed Rule 33.10 is substantively the same as proposed Rule 32.10.

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

Proposed Rule 32.11(a) ("summary disposition"), (b) ("setting a hearing"), and (c) ("notice to victim") are based on current Rule 32.6(d) ("review and further proceedings), with similarly named subparts. Proposed section (a) is the same as the current corresponding subpart, and proposed section (c) has been modestly but not substantively restyled. The provision on setting a hearing truncates the corresponding current Rule 32.6(d) by eliminating text that the Task Force considered superfluous (i.e., if the court does not summarily dismiss the petition, it may set a hearing "on those claims that present a material issue of fact. The court also may set a hearing on those claims that present only a material issue of law.") See further proposed Rules 32.11(b) and 32.13 on setting a hearing.

Proposed Rule 32.11(d) ("defendant's competence") is a new provision and represents the Task Force's response to *Fitzgerald v. Myers,* 243 Ariz. 84 (2017). This provision provides the court discretion to order a competency evaluation if the defendant's competency is necessary for the presentation of a post-conviction claim. However, the provision intentionally does not include a cross-reference to Rule 11 to allow the trial judge to fashion an ad hoc process for the infrequent occasions when this issue might arise in a post-conviction proceeding.

Rule 33.11. Court Review of the Petition, Response, and Reply; Further Proceedings

Proposed Rule 33.11 is identical to proposed Rule 32.11.

Rule 32.12. Informal Conference

This proposed rule is identical to current Rule 32.7.

Rule 33.12. Informal Conference

Proposed Rule 33.12 does not contain proposed Rule 32.12(b), which concerns informal conferences in capital cases. With that exception, proposed Rules 32.12 and 33.12 are identical.

Rule 32.13. Evidentiary Hearing

Proposed Rule 32.13 is identical to current Rule 32.8, with the exception that the section title of current Rule 32.8(a) ("rights attendant to the hearing; location; record") has been changed in proposed Rule 33.13(a) to "generally."

Rule 33.13. Evidentiary Hearing

Proposed Rule 33.13 is identical to proposed Rule 32.13.

Rule 32.14. Motion for Rehearing

Current Rule 32.9 is titled "Review." Proposed Rule 32.14 is based on current Rules 32.9(a) ("filing of a motion for rehearing") and 32.9(b) ("disposition if motion granted"), and in part on current Rule 32.9(d), as noted below.

Proposed Rule 32.14(a) ("timing and content"), (b) ("response and reply"), and (d) ("effect on appellate rights") correspond with subparts (1), (2), and (3) of current Rule 32.9(a).

Proposed Rule 32.14(c) ("stay") is based on current Rule 32.9(d) ("stay pending review"), but it omits a reference to a stay pending the State's filing of a petition for review, which is covered by proposed Rule 32.16(i). The proposed provision has been modestly restyled.

Proposed Rule 32.14(e) ("disposition if motion granted") is based on current Rule 32.9(b).

All the proposed provisions are substantively similar to their current counterparts.

Rule 33.14. Motion for Rehearing

Proposed Rule 33.14 is identical to proposed Rule 32.14.

Rule 32.15. Notification to the Appellate Court

Current Rule 32.4(a)(4), and proposed Rule 32.4(b)(4)(C), require the trial court clerk to send a copy of a notice requesting post-conviction relief to the appropriate appellate court. As further noted in the current comment to this provision, which proposed Rule 32.4 incorporates, the appellate court may stay the appeal pending an adjudication of the post-

conviction proceeding, and then consolidate its review of that proceeding with the appeal. However, the Task Force noted that current Rule 32 contains no mechanism for notifying the appellate court when the post-conviction proceeding was adjudicated. Proposed Rule 32.15 provides a mechanism. It requires the defendant's counsel, or a self-represented defendant, to promptly send to the appellate court a copy of any trial court ruling on a notice, a petition, or a motion for rehearing that grants or denies relief.

Rule 33.15. Notification to the Appellate Court

The Task Force recognized that there should not be an appeal associated with a Rule 33 proceeding, but it also contemplated that under Rule 33, a defendant may have a petition for review of a prior Rule 33 proceeding pending in an appellate court concurrently with a successive Rule 33 proceeding in the trial court. Rule 33.15 requires defendant's counsel or a self-represented defendant to provide a similar notice to the appellate court of any relief granted or denied by the trial court.

Rule 32.16. Petition and Cross-Petition for Review

Proposed Rule 32.16 is based on current Rule 32.9 ("review"), sections (c) through (i). There are multiple organizational changes, because bifurcating Rule 32.9 into a rule on motions for rehearing and a separate rule on petitions for review allowed the Task Force to move section and subpart headings up one level, allowing more visible titles and reducing organizational clutter.

There also are notable substantive changes.

- The current rule does not contain a separate provision for the length of a petition or response in a capital case. Proposed Rule 32.16(c)(1) would provide that a petition or response in a capital case must not exceed 12,000 words or 50 pages if handwritten [that is, doubling the limits provided for a petition in a non-capital case], exclusive of an appendix and copies of the trial court's rulings.
- The contents of a petition for review, described in proposed Rule 32.16(c)(2)(A), must also include copies of specified rulings by the trial court's, including the summary disposition of a notice requesting post-conviction relief.
- Proposed Rule 32.16(d) ("appendix accompanying a petition or cross-petition") no longer differentiates an appendix in a capital and a non-capital case. Rather, it eliminates any reference to the appendix in a capital case petition for review because the Supreme Court has electronic access to the complete trial court record in these situations.
- Proposed Rule 32.16(m) ("return of the record"), like current Rule 32.9(h), requires the appellate court to return the record to the trial court clerk after appellate resolution of the petition, but the proposed rule omits the last two words of the

current rule, "for retention." The Task Force believes that the trial court clerk does not require direction on what to do with the returned appellate record.

Rule 33.16. Petition and Cross-Petition for Review

Proposed Rule 33.16 is substantively similar to proposed Rule 32.16, except it does not include any provisions concerning petitions for review in capital cases.

Rule 32.17. Post-Conviction Deoxyribonucleic Acid Testing

Proposed Rule 32.17 is based on current Rule 32.12.

Because the remaining provisions of current Rule 32 apply only to capital cases, the Task Force proposes renumbering current Rule 32.12 as Rule 32.17, which will maintain parallel rule numbering throughout proposed Rules 32 and 33.

Current Rule 32.12 and proposed Rule 32.17 both have eight sections. Seven of the eight sections of the proposed rule make no substantive changes to the current provisions.

Proposed Rule 32.17(d) ("court orders") makes a substantive change to current Rule 32.12 (d). The current section includes a subpart concerning "mandatory testing," and another subpart on "discretionary testing." The Task Force did not perceive a meaningful difference in the criteria or application of these subparts. They accordingly merged these subparts into a single subpart (d)(1) titled "DNA testing."

The Task Force parenthetically notes that a defendant may submit a petition for DNA testing independently of a post-conviction petition. However, this provision on DNA testing has been included in Rule 32 for the past several years, and the Task Force does not propose to remove it from its proposed Rule 32.

Rule 33.17. Post-Conviction Deoxyribonucleic Acid Testing

Proposed Rule 33.17 is substantively similar to proposed Rule 32.17.

Note: The following three rules concern capital cases only. Consequently, Rule 33 contains no counterparts to these rules.

Rule 32.18. Stay of Execution of a Death Sentence on a Successive Petition

Proposed Rule 33.18 derives from current Rule 32.4(g). The provision has been slightly restyled, but it is substantively the same.

Rule 32.19. Review of an Intellectual Disability Determination in Capital Cases

Proposed Rule 32.19 derives from, and is identical to, current Rule 32.10.

Rule 32.20. Extensions of Time; Victim Notice and Service

This rule is based on current Rule 32.11. Although current Rule 32.11(a) ("notice to the victim") includes a reference to "the victim in a capital case," the Task Force considered whether the statute referenced in the rule, A.R.S. § 13-4234.01, as well as other statutes regarding victims' rights, require this rule to include a provision for victims in non-capital cases. They concluded that the referenced statute applied only to capital cases, and that this rule did not need to encompass victims in non-capital cases.

From: Staff
To: R32TF Members
Re: **Forms**
Date: March 22, 2019

The January 2019 Task Force rule petition noted that the adoption of the proposed rules would necessitate amendments to existing forms and the adoption of new forms. The petition requested a modified comment period and indicated that the Task Force would file proposed forms with the Amended Petition.

The March 22 meeting materials include six forms. Versions that amend existing forms have been restyled and reformatted (Forms 23(a), 23(b), 24(b), 25(a), and 26). A new form (Form 25(b) is based on a version presented to the Task Force in August but has been slightly modified and reformatted. Reformatting and reorganization of these six forms allows for a uniform appearance and enhances readability.

Form 23(a): Notice of Rights After Sentencing in the Superior Court (non-capital) and
Form 23(b): Notice of Rights After Sentencing in a Capital Case

The impetus for the revisions to Form 23 was to differentiate rights of post-sentencing review for pleading and non-pleading defendants, i.e., for those defendants who are governed by Rule 32 and those governed by Rule 33.

Current Form 23 ("Notice of Rights of Review After Conviction in Superior Court") applies to capital as well as non-capital cases. Staff believes that at most, there are two dozen capital judgments annually in Arizona, compared to tens of thousands of non-capital judgments, and therefore saw little need to include capital case information that had no application to the overwhelming majority of cases. Form 23(a) therefore removed capital case verbiage and relocated that information to new Form 23(b).

Both forms include new topic headings (e.g., "what to file," "when to file," "how to file," etc.) Some content has been modified, e.g., in Form 23(a), the current "the entry of judgment and sentence occurs at the time of sentencing" is now "the date the court entered your judgment and sentence is the day the judge orally pronounced your sentence in the courtroom," which should be clearer and more informative.

- The draft form includes a question, based on the current form, about the clerk providing a "a full copy of the rules governing appeals and post-conviction relief…upon request." Is this true?

Form 23(a) includes a new section on the right to apply to have a conviction set aside. This is mandated by a recent rule amendment. See Rules 26.11(a)(1)(D) and 26.11(b). Although this particular modification goes beyond the charge to the R32TF, information on a set aside should be

included if the Court is going to amend the form. Form 23(b) does not include set-aside information; see A.R.S. § 13-907(K).

Current Form 23 and proposed Form 23(a) both include a statement under the caption that says, "In limited jurisdiction cases, see Superior Court Rules of Appellate Procedure-Criminal, Form 1." Staff believes that SCRAP Form 1 is inadequate for the purposes of fulfilling the requirements of Rule 26.11. The SCRAP form does not discuss post-conviction relief or the right to set aside the conviction.

- Staff suggests either deleting the statement in proposed Form 23(a), or redrafting SCRAP Form 1 to comply with Rule 26.11.

Form 24(b): Notice Requesting Post-Conviction Relief

The Notice of Post-Conviction Relief was modified to accommodate both Rule 32 and Rule 33 proceedings.

The prefatory instructions in the current form were substantially modified.

The form has three sections: (A) Information about the defendant; (B) Information about the defendant's sentence; and (C) Post-conviction relief claim. The form includes distinct subparts for non-pleading and pleading defendants. The concluding sections are a "Request for post-conviction relief," which requires the defendant's signature, and a "request for an attorney and affidavit of indigency," which requires the defendant's notarized signature.

- Staff would like to reduce the length of the form (it is, after all, simply a notice), but this might not be possible if the form needs to include multiple questions about the timeliness of the filing.

Form 25: Petition for Post-Conviction Relief

The proposed form of the petition, like the notice form above, has been adapted to accommodate Rule 32 and Rule 33 claims.

The instructions in the current form have been substantially modified. For example, the current form begins by advising that "you should first file Form 24(b)." The proposed form makes this mandatory ("must file"), i.e., filing a petition without a notice is not an option. The proposed form also deletes certain precatory language in the current form (e.g., "take care to include every ground" in the current form, compared to the proposed, "include in this petition every ground….") The proposed form, unlike the current form, does not use upper case sentences in the instructions, but it does extensively use bold font to highlight topics throughout the form. The proposed form notes that there are time limits for filing the petition.

Also, and unlike the current form, the proposed form uses rule citations (e.g., Rule 32.1(a)) to facilitate cross-references. Section 5 of the current form contains a list of about 20 grounds for relief, which on their face are available to pleading as well as non-pleading defendants. In the proposed form, the defendant completes either section 2, if the defendant is proceeding under Rule 32, or section 3, if the defendant is proceeding under Rule 33. Section 4, which requires supporting facts and exhibits, is by formatting given more prominence, and because of the importance of supporting facts, the form instructs the defendant to "use additional pages if necessary."

- However, since the facts are the heart of the petition, members might consider adding additional language, such as "claims must be supported by facts, and not just generalizations and allegations."

The attestation above the defendant's signature on the proposed form is substantially similar to the attestation in the current form. However, these attestations deviate from the requirements of the current and proposed rules, both of which require the defendant to identify facts within the defendant's personal knowledge separately from other factual allegations.

- Either the rule should be changed to conform to the attestation, or vice versa.

Form 25(b): Checklist for No Colorable Claims (Rule 33)

This form is based on an unnumbered form that Judge Viola and Mikel Steinfeld presented at an August Task Force meeting. Mr. Steinfeld clarified after the December Task Force meeting that this form was designed only for pleading defendants, and that there is no corresponding form for non-pleading defendants.

The proposed form is like the one previously presented, with a few exceptions. The introductory language was revised. The plea proceedings have been designated as Part A of the form, and the sentencing proceedings have been designated as Part B. The previous "Advising and Questioning the Defendant" in Part A is now "Advising and Questioning the Defendant During the Plea Colloquy." The former "Factual Basis" is now "The court found a factual basis for the plea." Rule references have been italicized so they stand out from each respective requirement. The previous checkboxes were removed to emphasize that completing the form requires more than a series of checkmarks.

Form 26: Defendant's Request for the Court Record

The proposed form is significantly different than the current one. A note at the beginning of the form advises that the court's record includes all documents filed with the clerk and transcripts of oral proceedings. The subsequent sections of the form are requests for "documents" and "transcripts." The note also advises that a defendant who requests copies of items admitted into evidence must make the request by a separate motion. The proposed form requires the defendant

to indicate whether the notice requesting post-conviction relief was filed under Rule 32 or Rule 33.

The section on documents refers to "the presumptive record." The form explains that presumptive record includes "charging documents, motions and responses to motions and replies, minute entries, reports to the court, and court orders." The defendant can omit certain items in the presumptive record, or request additional items, by specifying those items on the form. Unlike the current form, the proposed form does not refer to "instruments," a term whose meaning is not clear.

Under the transcripts section, the defendant who is proceeding under Rule 32 would complete subpart (1). A defendant proceeding under Rule 33 would complete subpart (2).

//

Form 23(a). Notice of Rights After Sentencing in the Superior Court (Non-Capital)

_____ **COURT** _____ **County, Arizona**

STATE OF ARIZONA, Plaintiff

-vs-

_____

Defendant (first, middle, and last name)

[CASE/COMPLAINT NO.]

_____

NOTICE OF RIGHTS AFTER SENTENCING IN THE SUPERIOR COURT * (Non-Capital)

*In limited jurisdiction cases, see Superior Court Rules of Appellate Procedure-Criminal, Form 1.

RIGHT TO APPEAL

You have a right to appeal from a final judgment of conviction or a verdict of guilty except insane, from an order denying a motion for new trial, from an order entered after judgment affecting your substantial rights, or from a sentence that you claim is illegal or excessive.

However, you do not have a right to direct appeal from your final judgment of conviction and sentence if you: (1) entered a plea of guilty or no contest; (2) admitted that you violated your conditions of probation; or (3) failed to appear at sentencing, which resulted in sentencing occurring more than 90 days after the date of conviction. In these three situations, you may seek relief only by a petition for post-conviction relief under Rule 33. (See the section below on post-conviction relief.)

EXERCISING YOUR RIGHT TO APPEAL

1. Notice of Appeal. If you want to appeal, you must file a Notice of Appeal (Form 24(a)) within 20 days after the date the court entered your judgment and sentence. You will lose your right to appeal if you do not file a Notice of Appeal within 20 days of that date. The date the court entered your judgment and sentence is the day the judge orally pronounced your sentence in the courtroom.

If you want to appeal, you should let your lawyer know that you want to appeal. You can file a Notice of Appeal before you leave the courtroom on the day you are sentenced. After that, you should contact your lawyer by phone, letter, or in person, and tell your lawyer that you want to appeal.

2. If You Want to Appeal but Do Not Have a Lawyer. If you do not have a lawyer, ask the clerk of the court, or staff at the jail or prison where you are incarcerated, for Form 24 (a), which is a Notice of Appeal. Also ask for Form 5, which is Defendant's Financial Statement and Request for Appointment of Counsel. Complete both forms and immediately file them with, or send them to, the clerk of the superior court in the county where you were sentenced. These forms must arrive at the clerk's office within 20 days after the date you were sentenced.

3. Waiver of the Right to a Lawyer. You have a right to be represented by a lawyer or your appeal, and you should have a lawyer handle your appeal. However, you may also represent yourself. If you choose to waive your right to appellate counsel, you must file a written waiver no later than 30 days after filing your notice of appeal. If you file your waiver before you file your notice of appeal, or at the same time, the waiver must be filed in the superior court. If you file your waiver after you filed your notice of appeal, you must file the waiver in the superior court and in the appellate court. If the superior court determines that your waiver of appellate counsel is knowing, intelligent, and voluntary, you will be allowed to represent yourself on appeal. But the court may appoint advisory counsel for you during any stage of the appeal.

RIGHT TO POST-CONVICTION RELIEF

Every defendant in the superior court has a right to request post-conviction relief under Rule 32 or 33.

1. What to File. To exercise your right to post-conviction relief, you first must file a Notice Requesting Post-Conviction Relief, Form 24(b).

2. When to File. If you do not file a Notice Requesting Post-Conviction Relief within the required time, you may lose the opportunity to have the court correct any errors that might have occurred in your case.

(a) If you did not have an appeal. If you did not file, or if you did not have the right to file, a Notice of Appeal, you must file a Notice of Post-Conviction Relief within 90 days after the entry of judgment and sentence.

(b) If you did have an appeal. If you did appeal, you must file a Notice of Post-Conviction Relief within 30 days after the appellate court issues an order and mandate affirming the judgment and sentence.

3. How to File. You must obtain a copy of Form 24(b) (Notice Requesting Post-Conviction Relief) from your attorney, the clerk of the court, or staff at the jail or prison where you are incarcerated. Complete the notice and file it with, or send it to, the clerk of the superior court of the county where you were sentenced. The notice must arrive at the clerk's office within the time specified in paragraph 2.

4. Requesting a Lawyer. If you want a lawyer to represent you in your post-conviction proceeding and you cannot afford to hire a lawyer, you should sign before a notary public the Affidavit of Indigency contained in the Notice Requesting Post-Conviction Relief and request the court to appoint a lawyer to represent you.

If you want a full copy of the rules governing appeals and post-conviction relief, the clerk of the court in the county where you were convicted will send you one upon request. [Is this true?]

RIGHT TO APPLY TO HAVE A CONVICTION SET ASIDE - On fulfillment of the conditions of probation or sentence, and discharge by the court, you may apply to the court where you were sentenced to have the judgment of guilt set aside. Your attorney or probation officer can apply on your behalf. If you were convicted of multiple offenses, the Court must act on each individual case and each individual count. If you have more than one case number, you must file a separate application for each case number. The court will not charge a fee for filing an application to set aside a conviction.

The Application to Set Aside Conviction (Form 31(a)) is available online from the Arizona Judicial Branch Self-Service Center at azcourts.gov/ and from most superior court web sites. Complete the form and file it with, or send it to, the clerk of the superior court of the county where you were sentenced.

Note: A person who was convicted of any of the offenses listed in A.R.S. § 13-907(K) cannot apply to have the conviction set aside.

RECEIPT BY DEFENDANT

I have received a copy of this notice.

_____ _____

Date Defendant's Signature

Form 23(b). Notice of Rights After Sentencing in a Capital Case

_____ **COUNTY** _____ **County, Arizona**

STATE OF ARIZONA, Plaintiff

[CASE/COMPLAINT NO.]

_____

-vs-

_____
Defendant (first, middle, and last name)

NOTICE OF RIGHTS AFTER SENTENCING IN A CAPITAL CASE

RIGHT TO APPEAL (CAPITAL CASE) If you were sentenced to death, the clerk will automatically file a notice of appeal at the time the court enters judgment and the death sentence. This notice is a sufficient notice of appeal with respect to all judgments entered and sentences imposed in your case. If you are indigent, the Supreme Court will appoint an attorney to represent you on your direct appeal.

RIGHT TO POST-CONVICTION RELIEF (CAPITAL CASE) If the Supreme Court affirms your death sentence, upon the issuance of a mandate affirming your conviction and sentence on direct appeal, the Supreme Court Clerk will automatically file with the superior court a Notice Requesting Post-Conviction Relief . The superior court will appoint a lawyer to represent you in the post-conviction relief proceeding.

If on direct appeal the Supreme Court vacates your death sentence, it is your responsibility to file your own Notice Requesting Post-Conviction Relief. (See the section below).

RIGHT TO POST-CONVICTION RELIEF (NON-CAPITAL CASE) Every defendant has a right to file a petition in the superior court requesting post-conviction relief.

1. What to File. To exercise your right to post-conviction relief, you first must file a Notice Requesting Post-Conviction Relief, Form 24(b).

2. When to File. The notice must arrive at the clerk's office within 30 days after the issuance of the order and mandate on direct appeal. If you do not file a Notice Requesting Post-Conviction Relief within the required time, you may lose the opportunity to have the court correct any errors that might have occurred in your case.

3. How to File. You must obtain a copy of Form 24(b) (Notice of Post-Conviction Relief), either from your attorney, the clerk of the court, or staff at the jail or prison where you are incarcerated. Complete the notice and file it with, or send it to, the clerk of the superior court of the county where you were sentenced. The notice must arrive at the clerk's office within the time specified in paragraph 2.

4. Requesting a Lawyer. If you want a lawyer to represent you in your post-conviction proceeding and you cannot afford to hire a lawyer, you should sign before a notary public the Affidavit of Indigency contained in the Notice Requesting Post-Conviction Relief and request the court to appoint a lawyer to represent you.

If you want a full copy of the rules governing appeals and post- conviction relief, the clerk of the court in the county where you were convicted will send you one upon request. [Is this true?]

RECEIPT BY DEFENDANT

I have received a copy of this notice.

_____ _____

Date Defendant's Signature

Form.24(b). Notice Requesting Post-Conviction Relief

Court Name or Location: _____ County: _____

STATE OF ARIZONA,
Plaintiff,

vs.

_____
Defendant's Name

Case number: _____

NOTICE REQUESTING POST-CONVICTION RELIEF

If the Defendant was sentenced after a **trial** or after a **probation violation hearing**, the Defendant must request relief under **Rule 32** of the Arizona Rules of Criminal Procedure.

If the Defendant was sentenced after a **plea of guilty or no contest**, after the **admission of a probation violation**, or after an **automatic violation of probation**, the Defendant must request relief under **Rule 33** of the Arizona Rules of Criminal Procedure.

There are time limits for filing this notice. See section C below. There are also time limits for filing a petition for post-conviction relief. See **Rules 32.7 and 33.7**.

A. INFORMATION ABOUT THE DEFENDANT:

1. Name (first, middle, and last): _____
2. Date of Birth: _____
3. Mailing address: _____

   City, State, Zip Code: _____
4. Is the Defendant currently in jail or prison? [ ] **Yes** [ ] **No**
   If yes, the defendant's inmate number is: _____

B. INFORMATION ABOUT THE DEFENDANT'S SENTENCE:

1. The Defendant was sentenced on the following date: _____
2. The Defendant was sentenced after:
   - [ ] a plea of guilty or no contest.
   - [ ] a trial.
   - [ ] an admission of a probation violation.
   - [ ] an automatic violation of probation (because the defendant was convicted of another crime).
   - [ ] a probation violation hearing.
3. The Defendant was sentenced in this case for the following crime or crimes:

   _____
4. The Defendant received the following sentence:

   _____
5. The Defendant was represented by the following lawyer at sentencing:

   _____
6. After the Defendant was sentenced, the Defendant had an appeal: [ ] **Yes** [ ] **No**
   If yes, the appellate court issued its mandate on: _____

7. After the Defendant was sentenced, the Defendant had a previous post-conviction proceeding (under Rule 32 or Rule 33): [ ] **Yes** [ ] **No**
If yes, that proceeding was final on the following date: _____

C. POST-CONVICTION RELIEF CLAIM:

Under Rule 32.1(a), a defendant may request post-conviction relief after a trial or a contested probation violation hearing if the defendant's conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions. **Under Rule 33.1(a)**, a defendant may request post-conviction relief if the defendant's guilty or no contest plea or admission to a probation violation was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions. A claim of incompetent or ineffective assistance of counsel is raised under Rule 32.1(a) or Rule 33.1(a).

1. Is the Defendant raising a claim under **Rule 32.1(a)?** [ ] **Yes** [ ] **No**

If yes, this notice is being timely filed:
[ ] within 90 days after the **oral pronouncement** of sentence,
OR
[ ] within 30 days after the issuance of the mandate in the **direct appeal**.
OR
[ ] This notice is not timely, but that is not the defendant's fault because:

_____

2. Is the Defendant raising a claim under **Rule 33.1(a)?** [ ] **Yes** [ ] **No**

If yes, this notice is being timely filed:
[ ] **within 90 days** after the oral pronouncement of sentence,
OR
[ ] The Defendant is raising a claim that the Defendant received **ineffective assistance** of Rule 33 counsel in Defendant's first Rule 33 proceeding **AND**

This notice is being filed:
[ ] no later than 30 days after the **trial court's final order** in the first post-conviction proceeding
OR
[ ] if the defendant requested appellate review of that order, no later than 30 days after the **appellate court issued its mandate** in that proceeding

OR
[ ] This notice is not timely, but that is not the defendant's fault because:

_____

3. Is the Defendant raising a claim under **Rule 32.1(b)-(h) or Rule 33.1(b)-(h) ?**
[ ] **Yes** [ ] **No**

If yes, check all boxes that apply.

[ ] The court did not have **subject matter jurisdiction** to render a judgment or impose a sentence on the Defendant [Rule 32.1(b) or 33.1(b)]

[ ] The sentence as imposed by the judge or as computed by the Arizona Department of Corrections is **not authorized by law** (or, if the Defendant entered a plea, by a plea agreement) [Rule 32.1(c) or 33.1(c)]

[ ] The Defendant continues to be or will continue to be **in custody after the sentence expires** [Rule 32.1(d) or 33.1(d)]

[ ] **Newly discovered material facts** probably exist, and those facts probably would have changed the judgment or sentence [Rule 32.1(e) or 33.1(e)]

[ ] The **failure to timely file a notice** of appeal or a notice of post-conviction relief was not the Defendant's fault [Rule 32.1(f) or 33.1(f)]

[ ] There has been a **significant change in the law** that, if applicable to the Defendant's case, would probably overturn the Defendant's judgment or sentence [Rule 32.1(g) or 33.1(g)]

[ ] There is **clear and convincing evidence** that the facts underlying the Defendant's claim are sufficient to establish that no reasonable fact-finder would find the Defendant guilty of the offense beyond a reasonable doubt [Rule 32.1(h) or 33.1(h)]

The Defendant:

[ ] has raised each claim within a reasonable time after learning of the claim,

OR

[ ] has failed to timely file a notice, but that is not the defendant's fault because:

_____

REQUEST FOR POST-CONVICTION RELIEF

The Defendant is requesting post-conviction relief. The Defendant understands that the Defendant's petition for post-conviction relief must include every ground for relief that is known to the Defendant that has not been previously raised and decided.

_____ _____

Date Defendant's signature

REQUEST FOR AN ATTORNEY AND AFFIDAVIT OF INDIGENCY

The Defendant requests the court to appoint an attorney to represent the Defendant in this post-conviction proceeding. The Defendant states under oath and under penalty of perjury as follows:

I am indigent, and because of my poverty I am financially unable to pay a lawyer to represent me without incurring substantial hardship to myself or my family.

_____ _____

Date Defendant's Signature

STATE OF _____

COUNTY OF _____

Subscribed and sworn to or affirmed before me this: _____ (date)

by _____.

_____

(notary seal) Deputy Clerk or Notary Public

Form 25. Petition for Post-Conviction Relief

_____ **COURT** _____ **County, Arizona**

STATE OF ARIZONA, Plaintiff

-vs-

_____

Defendant (FIRST, MI, LAST)

[CASE/COMPLAINT NO.]

_____

PETITION FOR POST-CONVICTION RELIEF UNDER
[ ] RULE 32
[ ] RULE 33

INSTRUCTIONS TO THE DEFENDANT

(1) You must file a Notice Requesting Post-Conviction Relief (Form 24(b)) before you file this petition.

(2) Answer the questions in this petition in readable handwriting or by typing. Use additional blank pages for completing your answers, if necessary, but write on only one side of the page.

(3) Indicate above whether you are filing this petition under **Rule 32** or **Rule 33**. If you are filing under **Rule 32**, answer question **2**. If you are filing under **Rule 33**, answer question **3**.

(4) Do not raise issues you have already raised on your appeal (if any) or in a previous petition for post-conviction relief (if any). Include in this petition every ground for relief you are aware of and that has not been raised and decided before. If you do not raise a ground now, you will not be able to raise it later.

(5) File your complete petition with the clerk of the court where you were convicted and sentenced (or mail it to the clerk of that court for filing.)

There are **time limits** for filing the petition.

- If you file under Rule 32, see the time limits in Rule 32.7.
- If you file under Rule 33, see the time limits in Rule 33.7.

1. INFORMATION ABOUT THE DEFENDANT

Name: _____

Current Status: [ ] On Probation [ ] Incarcerated [ ] On Parole [ ] On Community Supervision

Inmate number (if any): _____

2. RULE 32 GROUNDS FOR RELIEF - Defendant claims the following grounds for relief.

[ ] **Rule 32.1(a):** The defendant's conviction was obtained, or the defendant's sentence was imposed, in violation of the United States or Arizona constitutions, specifically:

[ ] The Defendant was denied the constitutional right to representation by a **competent and effective lawyer** at every critical stage of the proceeding.

[ ] The State used evidence at trial it obtained during an **unlawful arrest**.

[ ] The State used evidence at trial it obtained during an **unconstitutional search and seizure**.

[ ] The State used an **identification** at trial that violated the Defendant's constitutional rights.

[ ] The State used a **coerced confession** at trial; used a statement obtained in the absence of a lawyer, at a time when representation by a lawyer was constitutionally required; or there was other infringement of the Defendant's right against self-incrimination.

[ ] The State **suppressed** favorable evidence.

[ ] The State used **perjured testimony**.

[ ] There was a violation of the defendant's right not to be placed **twice in jeopardy** for the same offense or punished twice for the same act.

[ ] To determine the defendant's sentence, the State used a **prior conviction** that was obtained in violation of the United States or Arizona constitutions or Arizona statutes.

[ ] **Other rights** guaranteed by the United States or Arizona constitutions were abridged or denied.

[ ] **Rule 32.1(b):** The court did not have subject matter **jurisdiction** to render a judgment or to impose a sentence on the defendant.

[ ] **Rule 32.1(c):** The **sentence**, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law.

[ ] **Rule 32.1(d):** The defendant continues to be or will continue to be in custody after his or her **sentence expired**.

[ ] **Rule 32.1(e):** newly discovered **material facts** probably exist, and those facts probably would have changed the judgment or sentence.

Specify when the Defendant learned of these facts for the first time, and how they would have affected the trial.

_____

_____

_____

_____

[ ] **Rule 32.1(f):** the failure to **timely file** a notice of appeal was not the defendant's fault.

[ ] **Rule 32.1(g):** There has been significant **change in the law** that, if applicable to the defendant's case, would probably overturn the defendant's conviction or sentence.

[ ] **Rule 32.1(h):** This petition demonstrates by **clear and convincing evidence** that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.

[ ] Any **other ground** within the scope of Rule 32, Rules of Criminal Procedure (Specify):

_____

3. RULE 33 GROUNDS FOR RELIEF - Defendant claims the following grounds for relief.

[ ] **Rule 33.1(a):** The defendant's plea or admission to a probation violation was obtained, or the defendant's sentence was imposed, in violation of the United States or Arizona constitutions.

[ ] The Defendant was denied the constitutional right to representation by a **competent and effective lawyer** at every critical stage of the proceeding.

[ ] There was a violation of the defendant's right not to be **punished twice** for the same act.

[ ] **Other rights** guaranteed by the United States or Arizona constitutions were abridged or denied.

[ ] **Rule 33.1(b):** The court did not have subject matter **jurisdiction** to render a judgment or to impose a sentence on the defendant.

[ ] **Rule 33.1(c):** The **sentence**, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law or by the plea agreement.

[ ] **Rule 33.1(d):** the defendant continues to be or will continue to be in custody after his or her **sentence expired**.

[ ] **Rule 33.1(e):** newly discovered **material facts** probably exist, and those facts probably would have changed the judgment or sentence.

Specify when the Defendant learned of these facts for the first time, and how they would have affected the trial.

_____

_____

_____

_____

[ ] **Rule 33.1(f):** the failure to **timely file** a notice of post-conviction was not the defendant's fault.

[ ] **Rule 33.1(g):** There has been a significant **change in the law** that, if applicable to the defendant's case, would probably overturn the defendant's conviction or sentence.

[ ] **Rule 33.1(h):** This petition demonstrates by **clear and convincing evidence** that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.

4. SUPPORTING FACTS AND DOCUMENTS.

A. The Defendant submits the following **facts and legal authorities** in support of this petition. (Use additional pages if necessary.)

_____

_____

_____

_____

B. The following **affidavits, transcripts, and documents** are attached in support of the petition:

Affidavits [Exhibit(s) # _____]

Transcripts [Exhibit(s) # _____]

Documents [Exhibit(s) # _____]

C. **No** affidavits, transcripts or other supporting documents are attached because:

_____

_____

_____

_____

5. **ACTIONS TAKEN -** The Defendant has taken the following actions to secure relief from his conviction or sentence:

A. **Appeal?** [ ] **Yes** [ ] **No** (If yes, name the courts to which appeals were taken, date, number, and result.)

_____

_____

_____

_____

B. **Previous Post-Conviction Proceedings?** [ ] **Yes** [ ] **No** (If yes, name the court in which the previous petitions were filed, dates, and results. Include any appeals from decisions on those petitions.)

_____

_____

_____

_____

C. **Previous Habeas Corpus or Special Action Proceedings in the Courts of Arizona?** [ ] **Yes** [ ] **No** (If yes, name the courts in which such petitions were filed, dates, numbers, and results, including all appeals from decisions on such petitions.)

_____

_____

_____

_____

D. **Habeas Corpus or Other Petitions in Federal Courts?** [ ] **Yes** [ ] **No** (If yes, name the districts in which petitions were filed, dates, court numbers--civil action or miscellaneous, and results, including all appeals from decisions on such petitions.)

_____

_____

_____

_____

E. If the answers to one or more of the questions 5A, 5B, 5C, or 5D are "yes," explain why the issues that are raised in this petition have not been finally decided or raised before. (State facts.)

_____

_____

_____

_____

6. RELIEF REQUESTED

Because of the foregoing reasons, the relief which the petitioner requests is:

A. [ ] Release from custody and discharge.

B. [ ] A new trial.

C. [ ] Correction of sentence.

D. [ ] The right to file a delayed appeal.

E. [ ] Other relief (specify): _____

I declare under penalty of perjury that the information contained in this form and in any attachments is true to the best of my knowledge or belief.

_____ _____

Date Defendant

Form 25(b). Checklist for No Colorable Claims (Rule 33)

_____ **Case Number:** _____

Defendant

To demonstrate that the trial court and the parties met each of these requirements, provide in the right-hand column the location in the record, the presentence report (PSR), or elsewhere that shows compliance.

Part A. Guilty or No Contest Plea – Ariz. R. Crim. Proc. – Rule 17.

1. **Advising and Questioning the Defendant during the plea colloquy.** *Rules 17.1; 17.2*

   (a) Defendant was personally present. *Rules 17.1(a)(2); (f)* _____

   (b) The court explained the nature of the charge for the plea. *Rule 17.2(a)(1)* _____

   (c) The court explained the range of possible sentences: minimum, maximum, fines, special conditions. *Rule 17.2(a)(2).* _____

   (d) The court explained the constitutional rights waived by entering a plea. *Rules 17.2(a)(3); 17.3(a)(1)* _____

   (e) The court informed the defendant of the right to plead not guilty. *Rule 17.2(a)(4)* _____

   (f) The court explained that the entry of a guilty plea would result in the waiver of the defendant's right to appeal and that post-conviction relief would be the only available form of review. *Rules 17.1(e); 17.2(a)(5)* _____

   (g) The court advised the defendant of the immigration consequences of a guilty plea. *Rule 17.2(b)* _____

2. **Voluntariness of Plea.** The court determined the plea was voluntary, not the result of threats, not the result of force, not the result of promises. *Rules 17.1(b); 17.3(a); 17.4(c)* _____

3. **Factual Basis.** The court found a factual basis for the plea. *Rule 17.3(b)* _____

4. **Acceptance of Plea.** The court accepted the plea agreement either at the time of the change of plea, or at sentencing if deferred. *Rules 17.4(d); 17.3(b)* _____

5. **Written and Signed.** The plea agreement was in writing and signed by the defendant. *Rule 17.4(b)* _____

Part B. Sentencing – Ariz. R. Crim. Proc. – Rule 26.

1. **Disclosure of Reports.** The PSR and any other reports were disclosed to the Defendant before sentencing. *Rule 26.6(a)* _____

2. **Opportunity for Objections.** The Defendant had the opportunity to raise objections to the PSR. *Rule 26.8(b)* _____

3. **Rulings and Remedies on Objections.** The court ruled on the Defendant's objections and provided remedies where appropriate (e.g. new PSR, excision, sealing). *Rule 26.8(c)* _____

Form 25(b). Checklist for No Colorable Claims (Rule 33)

4. **Prosecutorial Compliance.** The prosecutor complied with any promises or guarantees made in the plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971). _____
5. **Pronouncement of Judgement.** *Rule 26.10(a)* _____
6. **Pronouncement of Sentence.** *Rule 26.10(b)*
   (a) The court gave the Defendant an opportunity to address the Court. *Rule 26.10(b)(1)*
   (b) The court considered Defendant's time in custody. *Rule 26.10(b)(2)*
   (c) The court explained the terms of sentence/probation. *Rule 26.10(b)(3)*
   (d) The court specified the commencement date. *Rule 26.10(b)(4)* _____
7. **Reasons for Sentence.** The court set forth its reasons for the sentence. *A.R.S. § 13-701(C)* _____
8. **Enforcement of Plea.** The court sentenced the defendant pursuant to the plea agreement. *17.4(d), (e), (g)* _____

Form 26. Defendant's Request for the Court Record

_____ **COURT** _____ **County, Arizona**

STATE OF ARIZONA, Plaintiff

-vs-

_____

Defendant (FIRST, MI, LAST)

[CASE/COMPLAINT NO.]

_____

DEFENDANT'S REQUEST FOR THE COURT RECORD

Note: The court's record includes all documents filed with the clerk. The court's record also includes transcripts of oral proceedings conducted in the courtroom. A defendant who requests copies of items admitted into evidence must make the request by a separate motion.

The Defendant has filed a Notice of Post-Conviction Relief under [ ] **Rule 32** (or) [ ] **Rule 33**.

The Defendant now requires items from the court's record to prepare the Defendant's petition for post-conviction relief.

The Defendant requests the items checked below. The Defendant's signature below affirms that the Defendant has not previously received the requested items.

[ ] **THE DEFENDANT REQUESTS DOCUMENTS FILED WITH THE CLERK**

The filed documents presumptively include the charging documents, motions and responses to motions and replies, minute entries, reports to the court, and court orders. This is referred to as "the presumptive record."

If the Defendant wants to **omit items** in the presumptive record, list them here:

_____

_____

If the Defendant requests **items in addition to** what is in the presumptive record, list them here:

_____

_____

[ ] THE DEFENDANT REQUESTS TRANSCRIPTS OF COURT PROCEEDINGS:

1. If the Defendant's Notice Requesting Post-Conviction Relief was filed under **Rule 32**, the Defendant requests transcripts of the following:

[ ] Evidentiary hearings.
Specify the subjects of the evidentiary hearings, or indicate "all": _____

[ ] Trial. If this box is checked, specify whether the Defendant requests transcripts of: (Check all that apply.)
- [ ] Hearings on pretrial motions
- [ ] Jury selection
- [ ] Opening statements
- [ ] Testimony of witnesses

[ ] Final arguments
[ ] Hearings on legal issues during trial
[ ] Hearings on Post-Trial Motions

[ ] Sentencing, including any presentence hearing

[ ] Rule 11 Hearing

[ ] Other (specify): _____

2. If the Defendant's Notice Requesting Post-Conviction Relief was filed under **Rule 33**, the Defendant requests transcripts of the following:

[ ] Change of Plea
[ ] Presentence Hearing
[ ] Sentencing
[ ] Probation Revocation Arraignment
[ ] Probation Violation Hearing
[ ] Probation Violation Disposition Hearing
[ ] Rule 11 Hearing
[ ] Other (specify): _____

3. **Omitted Proceedings.** The court will **not** provide transcripts of the following proceedings unless the Defendant checks a box requesting one or more specific items.

[ ] Hearings on Motions to Continue
[ ] Hearings Concerning Conditions of the Defendant's Pre-Trial Release
[ ] Arraignments
[ ] Pretrial Conferences
[ ] Trials in which no verdict was returned

Dated this ___ day of _____, 20___.

_____
Defendant or Attorney for Defendant

Copy of the foregoing
Mailed this ___ day of _____, 20___ to:

_____

_____

_____

_____

For the complete text of comments posted on the Rules Forum – click here	
Number + Source + Date	**Summary**
1. Katia Mehu 02.15.2019	The comment says in part, "To give full effect to the Arizona Supreme Court's Administrative Order No. 2018 – 07 stated goal of improving upon the objectives of Rule 32 and the post-conviction relief process, Rule 32.1(a) (Scope of Remedy) and Rule 32(6)(c) (Counsel's Notice of No Colorable Claims) should clearly inform Petitioners of the constitutional rights subject to review in post-conviction relief proceedings. …. "Petitioners contesting their convictions in Arizona are not being accorded the full panoply of due process rights conferred by the federal and the state constitutions where the rule of preclusion is automatically applied to all constitutional claims except ineffective assistance of counsel claims and claims requiring express waiver of constitutional rights. …. "Accordingly, Rule 32.1(a) and Rule 32(6)(c) should clearly inform Petitioners of the constitutional rights subject to review in post-conviction relief proceedings."
2. COSC 02.20.2019	On February 1, 2019, after hearing a presentation from the Hon. Joseph Welty, chair of the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure, the Committee on Superior Court, upon motion made and seconded, unanimously authorized Chairman Hon. David L. Mackey to file this comment on behalf of the committee. 'The Committee on Superior Court supports Rule Petition R-19-0012 which proposes changes to the Arizona Rules of Criminal Procedure by amending Rule 32, adopting a new Rule 33, amending various Rule 41 Forms, adopting new forms, renumbering existing Rule 33 and adopting conforming changes to Rule 17.1(e).'
3. Aderant 02.22.2019	**1. <u>Rules 32.6(d) and 33.6(d):</u>** The comment says, "Proposed Rules 32.6(d) and 33.6(d) both provide: Defendant's *Pro Se* Petition. Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for the defendant to file that petition by 45 days from the date counsel filed the notice.

	The court may grant additional extensions only on a showing of extraordinary circumstances. "Although the language of the Proposed Rules is similar to current Rule 32.4(d)(2)(B), the revisions make the rules ambiguous. Under the Proposed Rules, the extension of time for the defendant to file a petition is discretionary and the time to file the petition in the absence of an extension is unclear. A discretionary "extension" is problematic. "Accordingly, we suggest that Proposed Rules 32.6(d) and 33.6(d) be modified to state: *Defendant's Pro Se Petition. Upon the filing of counsel's notice of no colorable claim under subsection (c), the court may allow the defendant to file a petition on his or her own behalf. The time for defendant to file the petition is within 45 days after the date counsel has filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances."* **Staff Note:** In the first sentence of the suggested provision, staff recommends changing "may allow" to "must allow." **2. Deadlines Based on Manner of Transmittal of Documents** "Several of the Proposed Rules are ambiguous as to the meaning of the manner of transmittal of documents that triggers a deadline for a party to act. "For example, Proposed Rules 32.7(f) and 33.7(f) each provides: 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 40 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 40 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. [Emphasis added.] "Does a defendant "return" the petition when he or she mails it to the court, or must the court actually receive the petition within 40 days? Since a defendant's failure to meet the deadline could result in the severe consequence of dismissal with prejudice, we respectfully suggest that the rules would be clearer if they stated, for example, that the revised petition must be submitted electronically to the clerk's office within 40 days, or that the court must receive the petition within 40 days.

	"Similarly, Proposed Rule 32.15 provides: 'If an appeal of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must send to the appellate court within 10 days after the ruling is filed any trial court rulings granting or denying relief on the defendant's notice or petition for post-conviction relief, or any motion for rehearing. [Emphasis added.]' "It might be prudent to clarify what exactly needs to be done by the 10-day deadline. For example, does "send" encompass simply mailing by the 10th day? Must the document(s) be submitted to the appellate court by the 10th day? We also note that Proposed Rule 33.15 uses the more specific "must file in the appellate court". Accordingly, we suggest that Proposed Rule 32.15 be modified to provide that, within 10 days, the items must be "filed with the appellate court"." **3. Lack of Specificity of the Terms "Notice" and "Petition"** "There are also a number of Proposed Rules that refer simply to a "notice" or "petition" without specifying the exact document. Given that the rules apply to *pro* se defendants and counsel who may not be as familiar with the rules as those who use them regularly, we suggest the Proposed Rules add the full description of the document to avoid any confusion. We provide the following two examples for your reference (our suggested language is bracketed in red). "Proposed Rule 32.7(a)(1)(A)(ii) could state: 'A self-represented defendant must file a petition no later than 60 days after the notice [of request for post-conviction relief] is filed or the court denies the defendant's request for appointed counsel, whichever is later.' "Similarly, RCRP 32.13(e) would provide: '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 [of decision on petition for post-conviction relief under Rule 32.16]. If the defendant is indigent, preparation of the evidentiary hearing transcript will be at county expense.'" 4. **Miscellaneous**

	"We would like to also bring to your attention to two "scrivener's errors" in the proposed rules. "With respect to Proposed Rule 32.16(f), we note that subdivision (g) provides that "Rule 31.3(d) governs the computation of any appellate court deadline in this rule." Thus, there is no need to make the same statement in 31.3(f)(1)(A). Further, including this provision in 31.3(f)(1)(A) and not including it in 31.3(f)(3) may lead to confusion." **Staff Note:** The comment is well-taken. The redundant reference to Rule 31.3(d) in Rule 32.16(f)(1)(A) should be removed. "Proposed Rule 32.7(a)(2)(C) states in the last sentence: "For good cause and after considering the rights of the victim, the court may grant additional extensions for good cause." We believe the redundancy may have been unintentional." **Staff Note:** Agreed. The "good cause" phrase was inadvertently duplicated.
4. Kent Volkmer 02.22.2019	**1. Rules 32.1(c) and 33.1(c) (ground for relief – sentence):** The comment contends that the language of these provisions Is vague and will be an invitation for an increased number of defendants to challenge their sentences. They might construe the provision to raise claims about any aspect of ADOC's sentence computation, such as classification for parole eligibility, earned release credits, or eligibility for release to community supervision. These claims would also require participation by counsel for ADOC, who has more knowledge about classifications and computations, and require an appearance by the AG and well as the local county attorney. **2. Rule 33.1(e) (newly discovered evidence):** The comment expresses concern about changing the word "verdict," which is in the current rule, to "judgment." The comment believes this provision was intended to apply only to non-pleading defendants. **3. Rules 32.2 and 33.2 (preclusion):** The comment contends that expanding the list of claims that are not precluded in successive petitions will undermine the objective of finality. The comment also contends that the proposed changes contravene A.R.S. § 13-4231, which precludes section (b) and section (c) claims. The comment further cites to A.R.S. § 12-109(A), which provides in part that court rules "shall not abridge, enlarge or modify substantive rights of a litigant." The comment proposes that claims under Rules 32.1(c) and 33.1(c) should be precluded, and if not, that the rule should limit the number of times a defendant can bring such claims.

4. **Rule 32.4(b)(3)(D) and 33.4(b)(3)(D) (timeliness):**

The comment states that a rule allowing the court to excuse an untimely notice if there is an adequate explanation will undermine the finality of a case. It also notes that a crime victim has a constitutional right to finality. The comment states that the court should have discretion to decide these requests and proposes changing "must" to "may."

5. **Rules 32.5(a) and 33.5(a) (appointment of counsel):**

The comment contends that under the revised rule, and unlike the current rule, "all defendants get court-appointed counsel for their first petition for post-conviction relief regardless of whether or not they are indigent." It also suggests that the reference to Rule 6.1 "needlessly confuses" a post-conviction defendant's right to court appointed counsel.

Staff Note:

Rule 33.5(a) requires correction, possibly by consolidating a portion of subpart (3) with subpart (4), as follows

(a) Generally. No later than 15 days after the defendant has filed a timely or first notice under Rule 33.4, or a notice under Rule 33.4(b)(3)(C), the presiding judge must appoint counsel for the defendant if:

(1) the defendant requests it;

(2) the defendant is entitled to an appointed counsel under Rule 6.1(b); and

(3) there has been a previous determination that the defendant is indigent, or ~~the defendant has completed an affidavit of indigency~~

(4) the defendant has completed an affidavit of indigency and the court finds that the defendant is indigent.

6. **Rules 32.5(c) and 33.5(b) (appointment of experts, et al):**

The comment concedes the appropriateness of appointing investigators, experts, and mitigation specialists m capital cases, but contends there is no need for these appointments in cases in which the defendant pled guilty. The comment observes that the provision would discourage plea bargaining because the defendant could re-litigate the case after a plea.

7. **Rules 32.6(b) and 33.6(b) (discovery):**

The comment contends that the incorporation of this discovery provision, as well as the previous provision regarding the appointment of experts and investigators, "adulterates post-conviction relief by adding elements that will lower both the quality and efficiency that Rule 32 was supposed to bring to the appellate arena. Each Rule 33 petition will be an opportunity for a pleading defendant to attempt to retry portions of their case and that they will come to believe will set them free from the conviction." A footnote at page 7 of the comment relates to the volume of discovery requests these cases could produce. The comment further notes that this provision will result in litigation on the effect of the plea agreement, which includes language that "the defendant hereby waives and gives up any and all

	motions, defenses, objections, or requests which defendant has made or raised or could assert hereafter…." **8. <u>Rules 32.11(d) and 33.11(d) (defendant's competence):</u>** The comment contends that this new, one-sentence provision "injects a great deal of uncertainty into post-conviction relief proceedings" and that this rule would be used more often than anticipated. The comment asks about the meaning of "competence" in the post-conviction context, the effect of a lack of cooperation by a defendant in evaluating post-conviction competence, whether a defendant will require medication and if so, whether defendant will agree to medication, the impact of treatment on the ADOC, and the consequence of being able to resolve competence issues in the post-conviction process. The comment notes that a Rule 11 process would be inappropriate and impractical in a post-conviction proceeding. If this new post-conviction provision is necessary, the comment suggests referring to the defendant's "mental status" rather than "competence." **9. <u>Alternative.</u>** The comment proposes as an alternative to the "overreaching" proposed rules that a provision be added "providing a trial court with the discretion to grant review and/or relief in those unusual and extraordinary cases where justice may have gone awry."
5. LJC 02.28.2019	On February 20, 2019, after hearing a presentation from the Hon. Joseph Welty, chair of the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure, the Committee on Limited Jurisdiction Courts, upon motion made and seconded, unanimously authorized Chairman Hon. Antonio Riojas to file this comment on behalf of the committee. "The Committee on Limited Jurisdiction Courts supports Rule Petition R-19-0012 which proposes changes to the Arizona Rules of Criminal Procedure by amending Rule 32, adopting a new Rule 33, amending various Rule 41 Forms, adopting new forms, renumbering existing Rule 33 and adopting conforming changes to Rule 17.1(e)."

Law Office of Katia Mehu
P.O. Box 17787 ● Phoenix, AZ ● 85011-7787

February 15, 2019

Hon. Joseph Welty, Chair
Task Force on the Arizona Rules of Criminal Procedure
1501 West Washington Street, Suite 410
Phoenix, Arizona 85007
E-mail: mmeltzer@courts.az.gov

Members of the Rule 32 Task Force:

To give full effect to the Arizona Supreme Court's Administrative Order No. 2018 – 07 stated goal of improving upon the objectives of Rule 32 and the post-conviction relief process, Rule 32.1(a) (Scope of Remedy) and Rule 32(6)(c) (Counsel's Notice of No Colorable Claims) should clearly inform Petitioners of the constitutional rights subject to review in post-conviction relief proceedings.

Constitutional rights attendant to criminal proceedings encompass rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

Carter v. Illinois, 329 U.S. 173, 175–76 (1946), directs States to provide a mode by which federal constitutional rights are to be vindicated after conviction.

Arizona has chosen to provide Rule 32 proceedings as that vehicle for collateral review.

Rule 32.1(a) of the Arizona Rules of Criminal Procedure provides that a Petitioner may seek relief on grounds that a conviction or sentence is in violation of the United States or Arizona constitutions.

In practice, however, the only constitutional right litigated in Rule 32 proceedings is ineffective assistance of counsel.

With the exception of constitutional rights requiring express waiver, all other constitutional claims are per se precluded under the auspices of the preclusion rule (Rule 32.2) which provides that a petitioner 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.

However, the Arizona Rules of Criminal Procedure do not (and rightly so) direct a petitioner to raise constitutional claims on direct appeal.

Rule 31.10(7)(A)—giving effect to A.R.S. § 13-4033(A)—only identify the *types of proceedings* a petitioner may appeal therefrom: (1) a final judgment of conviction or verdict of guilty expect

insane; (2) an order denying a motion for a new trial; (3) an order made after judgment affecting the substantial rights of the party; and (4) a sentence on the grounds that it is illegal or excessive.

Petitioners contesting their convictions in Arizona are not being accorded the full panoply of due process rights conferred by the federal and the state constitutions where the rule of preclusion is automatically applied to all constitutional claims except ineffective assistance of counsel claims and claims requiring express waiver of constitutional rights.

This is particularly problematic where federal courts do not examine the merits of Fourth Amendment claims in a state federal habeas corpus petition. *Stone v. Powell*, 428 U.S. 465, 494 (1976). But for review in the occasional capital case, claims premised on violations of the Fourth Amendment escape review if not raised on direct appeal and therefore result in denial of full and fair litigation as the Supreme Court of the United States contemplates.

Examining Rule 32 within the context of an ineffective assistance of counsel claim, the Supreme Court of the United States noted that while a State may defer constitutional claims to collateral proceedings, that practice "is not without consequences for the State's ability to assert a procedural default in later proceedings." *Martinez v. Ryan*, 566 U. S. 1, 13 (2012).

Accordingly, Rule 32.1(a) and Rule 32(6)(c) should clearly inform Petitioners of the constitutional rights subject to review in post-conviction relief proceedings.

Regards,

/s/ Katia Méhu
LAW OFFICE OF KATIA MEHU

Aderant
BETTER TOGETHER

February 22, 2019

Hon. Joseph Welty, Chair
Task Force on Rule 32 of the Arizona Rules of Criminal Procedure
1501 West Washington Street, #410
Phoenix AZ 85007
602.452.3242
mmeltzer@courts.az.gov

Re: Petition R-19-0012 - Proposed Rules 32 and 33

Members of the Rule 32 Task Force:

We write to comment on Petition No. R-19-0012 submitted by the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure and to request that clarifying language be added to various proposed rule changes. While we recognize that the Task Force's primary objective is to substantively overhaul Rule 32, we believe that the adoption of new rules is an opportune time to make clear various references in the rules that are otherwise subject to multiple interpretations. This will result in less confusion about expected actions and relevant deadlines amongst counsel, *pro se* defendants, and the courts.

Proposed Rules 32.6(d) and 33.6(d)

Proposed Rules 32.6(d) and 33.6(d) both provide:

> Defendant's *Pro Se* Petition. Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for the defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

Although the language of the Proposed Rules is similar to current Rule 32.4(d)(2)(B), the revisions make the rules ambiguous. Under the Proposed Rules, the extension of time for the defendant to file a petition is discretionary and the time to file the petition in the absence of an extension is unclear. A discretionary "extension" is problematic.

Accordingly, we suggest that Proposed Rules 32.6(d) and 33.6(d) be modified to state:

> *Defendant's Pro Se Petition. Upon the filing of counsel's notice of no colorable claim under subsection (c), the court may allow the defendant to file a petition on his or her own behalf. The time for defendant to file the petition is within 45 days after the date counsel has filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.*

Other Rules Clarifications

There are a number of instances where we believe the Proposed Rules would benefit from additional language to make the rule unambiguous.

Deadlines Based on Manner of Transmittal of Documents

Several of the Proposed Rules are ambiguous as to the meaning of the manner of transmittal of documents that triggers a deadline for a party to act.

For example, Proposed Rules 32.7(f) and 33.7(f) each provides:

> 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 40 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 40 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. [Emphasis added.]

Does a defendant "return" the petition when he or she mails it to the court, or must the court actually receive the petition within 40 days? Since a defendant's failure to meet the deadline could result in the severe consequence of dismissal with prejudice, we respectfully suggest that the rules would be clearer if they stated, for example, that the revised petition must be submitted electronically to the clerk's office within 40 days, or that the court must receive the petition within 40 days.

Similarly, Proposed Rule 32.15 provides:

> If an appeal of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must send to the appellate court within 10 days after the ruling is filed any trial court rulings granting or denying relief on the defendant's notice or petition for post-conviction relief, or any motion for rehearing. [Emphasis added.]

It might be prudent to clarify what exactly needs to be done by the 10 day deadline. For example, does "send" encompass simply mailing by the 10th day? Must the document(s) be submitted to the appellate court by the 10th day? We also note that Proposed Rule 33.15 uses the more specific "must file in the appellate court". Accordingly, we suggest that Proposed Rule 32.15 be modified to provide that, within 10 days, the items must be "filed with the appellate court".

Lack of Specificity of the Terms "Notice" and "Petition"

There are also a number of Proposed Rules that refer simply to a "notice" or "petition" without specifying the exact document. Given that the rules apply to *pro* se defendants and counsel who may not be as familiar with the rules as those who use them regularly, we suggest the Proposed Rules add

the full description of the document to avoid any confusion. We provide the following two examples for your reference (our suggested language is bracketed in red).

Proposed Rule 32.7(a)(1)(A)(ii) could state:

> A self-represented defendant must file a petition no later than 60 days after the notice [of request for post-conviction relief] is filed or the court denies the defendant's request for appointed counsel, whichever is later.

Similarly, RCRP 32.13(e) would provide:

> 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 [of decision on petition for post-conviction relief under Rule 32.16]. If the defendant is indigent, preparation of the evidentiary hearing transcript will be at county expense.

Miscellaneous

We would like to also bring to your attention to two "scrivener's errors" in the proposed rules.

With respect to Proposed Rule 32.16(f), we note that subdivision (g) provides that "Rule 31.3(d) governs the computation of any appellate court deadline in this rule." Thus, there is no need to make the same statement in 31.3(f)(1)(A). Further, including this provision in 31.3(f)(1)(A) and not including it in 31.3(f)(3) may lead to confusion.

Proposed Rule 32.7(a)(2)(C) states in the last sentence: "For good cause and after considering the rights of the victim, the court may grant additional extensions for good cause." We believe the redundancy may have been unintentional.

Thank you for your time and consideration.

Sincerely,

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SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE 32; TO ADOPT A NEW RULE 33; TO AMEND VARIOUS RULE 41 FORMS AND TO ADOPT NEW FORMS; TO RENUMBER RULE 33, ARIZONA RULES OF CRIMINAL PROCEDURE; AND TO ADOPT A CONFORMING CHANGE TO RULE 17.1(e), ARIZONA RULES OF CRIMINAL PROCEDURE	Supreme Court No. R-19-____ **COMMENTS ON PETITION TO AMEND RULE 32**

Kent Volkmer, Pinal County Attorney, hereby submits comments on the Petition to Amend Rule 32; To Adopt a New Rule 33; To Amend Various Rule 41 Forms and to adopt New Forms; To renumber Rule 33, Arizona Rules of Criminal Procedure; and to adopt a Conforming Change to Rule 17.1(e), Arizona Rules of Criminal Procedure.

Rule 32.1(c) and Rule 33.1(c). The Sentence Imposed.

The addition of language for Rule 32/33 claimants to challenge their sentence "as computed by the Arizona Department of Corrections" is insufficient to determine the type of claim available. A defendant could easily construe this to contemplate all complaints he might have about any aspect of ADOC's computation of his sentence such as classification for parole eligibility, earned release credits, forfeited release credits or eligibility for release to community supervision. The vague language will be an invitation for many defendants to increasingly challenge their sentence.

Since ADOC is represented by counsel, it would seem that all claims that ADOC has wrongfully recomputed a sentence will be handled by ADOC's lawyers, the Attorney General, and all such claims will be referred to them. County Attorneys are at a distinct disadvantage in defending these claims as they are not privy to how ADOC classifies and computes sentences.

The addition in Rule 33.1(c) of "is not authorized by law **or by the plea agreement**" will result in the State appearing both through the Attorney

General (on ADOC's computation)[1] and the prosecuting agency (on the *Santobello* or other claims)[2] in any given action.

Rule 33.1(e). Newly Discovered Evidence.

Changing "verdict" to "judgment" alters the application of this avenue of relief. Verdict referred primarily to non-pleading defendants. The change is in contravention to A.R.S. § 13-4231 which was drafted for the non-pleading defendant (newly discovered material facts were discovered after

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[1] "As ADOC maintains, it "must determine whether a prisoner is eligible for release pursuant to the terms of a sentencing order," and it is not required to "review the legality of the prisoner's sentencing order." *Stein v. Ryan*, 662 F.3d 1114, 1118 (9th Cir. 2011); *see also* Ariz. R. Crim. P. 26.16(b) (providing "exact terms of the judgment and sentence" to be entered "in the court's minutes" and "no other authority shall be necessary to carry into execution any sentence entered therein")." *State v. Durazo*, (memo decision) 2 CA-CR 2016-0198-PR, 2016 WL 4926135, at *5 (App. Sept. 15, 2016). https://www.westlaw.com/Document/Icd0c62507c6911e6a46fa4c1b9f16bf3/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0

[2] In *Durazo*, the defendant claimed his plea agreement provided that his prison sentence would be served at 85% and ADOC had calculated his sentence as 100%-flat-time (the *Santobello* claim). The Pima County Attorney's Office deferred to the Attorney General's Office for response to Durazo's claims. *Id.* at *3. After the trial court denied Durazo relief, he filed a petition for review and a petition for special action. *Id.* at *4. The Court consolidated the two proceedings and it appears only the Attorney General filed a response. *Id.* at *1. As a result, the prosecuting agency's view of the issues discussed is absent, including those that may have pertained to timeliness or preclusion.

the trial, impeachment evidence substantially undermines testimony which was of critical significance **at trial**, would have changed the **verdict**).

Rule 32.2 and Rule 33.2. Preclusion of Remedy.

Preclusion should operate to bring some finality to a criminal conviction. While even the current Rule does not achieve that perfectly, expanding the list of claims that are not precluded in successive petitions will only exacerbate this issue.

Moreover, the proposed change to Rule 32.2/33.2 are in direct contravention of the governing statute. A.R.S. § 13-4232 provides that claims pursuant to A.R.S. § 13-4231(1), (2) and (3) (Rule 32.1(a), (b) and (c)) are precluded in successive petitions for post-conviction relief. The right to litigate the sentence imposed in post-conviction proceedings without limitation does enlarge or modify the substantive rights of a litigant. Rules made by the supreme court, shall not abridge, enlarge or modify substantive rights of a litigant. A.R.S. § 12-109(A).

Rule 32.1(c)/Rule 33.1(c) should be precluded. And if not precluded, a limitation on the number of times a defendant may bring said claim must be imposed.

Rule 32.4(b)(3)(D) and Rule 33.(b)(3)(D). Time for Filing.

The addition of a rule requiring the court to excuse an untimely notice if there is an adequate explanation will undermine the finality of a case. It will provide an opportunity for defendants to continue the litigation of post-conviction relief long after the time this avenue for relief should have been exhausted.

And finality, important without more, is also a right accorded to crime victims. Ariz. Const. Art. II, § 2.1(A)(10). A speedy trial and a prompt and final conclusion to a case after conviction is essential for victim healing. The delay in reaching finality that is already present in the post-conviction process will be aggravated. And for that time, the victims must continue to relive the most traumatic events of their lives.

The trial court should be given discretion in assessing these requests. The word "must" should be changed to "may."

Rule 32.5(a) and Rule 33.5(a). Appointment of Counsel.

Current Rule 32.4(b) is written in the conjunctive, while these proposed rules are not. Without the conjunctive "and" after (a)(1) in both rules, all defendants get court-appointed counsel for their first petition for post-conviction relief regardless of whether or not they are indigent. The

taxpayers are entitled to have the criminal justice system ensure that they are providing counsel only to indigent defendants; they should not be required to shoulder a burden that is not constitutionally theirs. Further, the reference back to Rule 6.1 needlessly confuses a post-conviction defendant's right to continued representation by taxpayer funded court-appointed counsel.

Rule 32.5(c) and Rule 33.5(b). Appointment of Investigators, Expert Witnesses, and Mitigation Specialists.

There may be an argument for the appointment of investigators, expert witnesses and mitigation specialists in post-conviction proceedings on death penalty cases. There is no corresponding argument for this provision in cases where the defendant waived his appellate rights and pled guilty. The trial process was truncated by the plea. It makes no sense to permit a pleading defendant to attempt to litigate his case after he has pled by requesting investigators, experts, and mitigation specialists.

Just as with the discovery provisions discussed below, the incorporation of this pre-trial provision in post-conviction proceedings will discourage offering plea agreements because the benefit of bargain will

inure mostly to the defendant leaving the State to litigate a defendant's case after he/she has pled.

Rule 32.6(b) and Rule 33.6(b). Discovery.

Incorporating pre-trial discovery provisions in post-conviction proceedings unreasonably expands and burdens post-conviction proceedings. These discovery provisions will create an unwieldly demand especially in successive petitions that often occur many years after the initial conviction.[3]

The incorporation of pretrial provisions, such as appointment of investigators, experts, mitigation specialists and discovery, adulterates post-conviction relief by adding elements that will lower both the quality and efficiency that Rule 32 was supposed to bring to the appellate arena. Each Rule 33 petition will be an opportunity for a pleading defendant to attempt to retry portions of his/her case that he/she has come to believe will set them free from the conviction.

[3] For example, in just 7 cases in Pinal County, defendants have filed over 100 pleadings requesting evidence logs, forensic reports, FBI files, tapes, transcripts, forensic reports on devices, e-mails, videos, investigators and experts.

It will also result in litigation of the effect of plea agreement language that provides, "the defendant hereby waives and gives up any and all motions, defenses, objections, or requests which defendant has made or raised, or could assert hereafter, to the court's entry of judgment against defendant and imposition of a sentence upon defendant consistent with this agreement."

Rule 32.11(d) and Rule 33.11(d). Defendant's Competence.

This new rule adds a provision that a court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim. This one sentence provision injects a great deal of uncertainty into post-conviction relief proceedings.

What is "competence" in the post-conviction context? Other looming questions are, will he/she need programming, will he/she need medication, will he/she agree to medication, what if he/she does not want to cooperate at all, what will ADOC need to do to accommodate programming/medication, what if there is no resolution to the question raised about the defendant's mental status? What is the remedy?

The reference to 'competence' will lead courts and practitioners to rely on their Rule 11 experience to guide their conduct. Court-appointed Rule 11

experts and restoration specialists are all required to be certified to practice in this area by the AOC. Their views and approaches are geared to the pre-trial detainee undergoing Rule 11. These views and approaches are not suitable to the post-conviction defendant in a Rule 32. Also, just as they do pre-trial, defendants will look at a provision to test their competency as another tool to attack their conviction.

The Rule, if needed at all, should not refer to competency, but rather mental status. The inclusion of this rule will encourage far more than infrequent use of it.

An Alternative.

If the goal is to 'leave no defendant behind,' an alternative would be to eliminate the overreaching of these proposed rules and instead incorporate a provision providing a trial court with the discretion to grant review and/or relief in those unusual and extraordinary cases where justice may have gone awry.

CONCLUSION

The proposed changes and additions in this Petition will impact the interests of justice served by the plea bargaining process. The benefits of a plea agreement will be significantly offset by the virtually unlimited ability

of a pleading defendant to endlessly litigate post-conviction relief. Contrary to the Task Force's beliefs, Pinal County is certain the proposed changes and additions in this Petition will add substantially to the burden already borne by appellate attorneys, trial courts and appellate courts without a commensurate benefit to justice or defendants.

RESPECTFULLY SUBMITTED This 22nd Day of February, 2019.

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ARIZONA SUPREME COURT

PETITION TO MODIFY RULES 18.5, 22.5, AND 32.1, ARIZONA RULES OF CRIMINAL PROCEDURE	R-19-_____ MARICOPA COUNTY ATTORNEY'S PETITION TO MODIFY RULES 18.5, 22.5 AND 32.1, ARIZONA RULES OF CRIMINAL PROCEDURE

The Maricopa County Attorney files this petition to modify the criminal rules to protect juror privacy during and after their service in criminal jury trials.

Respectfully submitted this ____day of January, 2019.

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

By_____
MARK C. FAULL
CHIEF DEPUTY

I. Introduction

Criminal prosecution in Arizona includes a constitutionally guaranteed right to a jury trial for both the accused and the State. Ariz. Const. art. II, §24; A.R.S. § 13-3983; *Phoenix City Prosecutor's Office v. Ybarra,* 218 Ariz. 232, 234 ¶¶ 10-13 (2008). To fulfill this constitutional guarantee, women and men are court ordered to appear and serve as jurors. The willingness of these citizens to step out of their everyday lives to appear and serve as jurors is the foundation of our entire trial-by-jury system. Without citizens willing to serve, the constitutional right to a jury trial is meaningless. The system must do what it can to protect the safety and privacy of those who serve as jurors. Failing to do so increases the burden of jury service, reducing the number of those willing to serve, and further burdening those who do. Juror privacy is one area where Arizona must do more to protect our jurors.

II. Argument

ARIZONA MUST GIVE CRIMINAL TRIAL JURORS THE ABILITY TO PROTECT THEIR PRIVACY.

Our appellate courts have recognized, as a matter of policy, the importance of encouraging jury service. *Stewart v. Carroll,* 214 Ariz. 480, 484 ¶ 20 (App. 2007). To that end, the court has shielded disclosure of a prospective juror's medical condition from public disclosure stating: "Individuals who are called for jury duty do not forfeit their privacy rights when they are called for jury duty." *Id.* at 484-85. As the court concluded, "Requiring prospective jurors to run the risk of having their private mental

or physical conditions made public hardly encourages jury service." *Id.* at 484-85. These juror privacy concerns prompted our legislature to enact A.R.S. § 21-202(B)(1)(c)—a statute exempting disclosure of a prospective juror's mental or physical condition which renders them incapable of jury service. Another statute, A.R.S. 21-312, limits release of jurors' names and biographical information.

The need to protect jurors' privacy has never been more vital than it is today. Today's public forum exists online via Twitter, blogs, and all manner of social networking communication. Information gathering no longer requires a trip to the courthouse and hours spent thumbing through files or scrolling through microfiche. Most records are now lodged in databases awaiting a Google search request which can be launched by anyone anywhere who has a computer or smart phone and an internet connection. Distributing the gathered information no longer depends on newspaper articles vetted and reviewed by an editor, approved for printing, and delivered each morning. Instead, with just a computer and internet connection, the information is disseminated almost instantaneously to a worldwide audience. *See* Blue's Guide to Jury Selection, by Lisa Blue Ph.D., J.D. and Robert B. Hirschhorn, J.D., Appendix G-5, by Ted A. Donner, December 2016 update.

Once a juror's first and last names are found, that juror's home address and other contact information are often easily found using any one of many internet-based people-locating search engines. This readily accessible information has led private

investigators or others seeking to discuss the specifics of juror service or deliberations to contact juror months or years after their service. Two examples of tracking down jurors years after their discharge from jury service arose in *State v. Pandeli*, 215 Ariz. 514 (2007), and *State v. Leteve*, 237 Ariz. 516 (2015)[1]. Some of these jurors contacted the State to express their displeasure at having their privacy invaded.

Providing jurors with an option to either allow contact or decline contact could address these concerns before unwanted contact occurs. "Opt-in/opt-out" provisions are, in today's world, familiar to most every consumer. Whether it be Facebook privacy settings, or credit card privacy options, privacy is an option many consumers embrace. Offering jurors a privacy option is consistent with the practice in the marketplace. A post-verdict opt-in/opt-out election that could only be disturbed by petitioning a court under a good-cause standard and allowing a court to set the scope of permissible contact would be a major step in the direction of juror privacy and would be consistent with current case law. *See State v. Olague*, 240 Ariz. 475, 481-82 (App. 2016).

Reluctance to serve on a criminal-case jury is understandable. Jurors in criminal trials are often exposed to violence, depravity and graphic evidence that is a far cry from what they see and deal with in their everyday lives. Their reluctance to appear

[1] The juror-track-down issue was not addressed in the cited appellate opinions. Citations are included for reference, only.

for jury service is exacerbated when, in addition to the unpleasant realities they must face during the trial, they forfeit their privacy for years to come.

Shielding jurors' home addresses from disclosure in voir dire is not new. In 1959 the Ninth Circuit upheld such an order. In that case, the federal circuit court affirmed a trial court's discretionary decision to shield jurors' home addresses by allowing jurors to identify the area or district in which they lived, rather than their specific address. *Johnson v. U.S.*, 270 F.2d 721, 724 (9th Cir.1959), *cert. denied,* 362 U.S. 937 (1960).

Some courts take a further step in protecting juror privacy by empaneling an "anonymous jury." This method shields juror names from all parties. Although this petition does not ask the Court to implement a provision for anonymous juries in Arizona, this technique is briefly mentioned to demonstrate one approach courts have used to address the privacy issue. Anonymous juries have been empaneled in high profile trials, such as the trial of former Illinois governor Rod Blagojevich. In the Blagojevich case the Seventh Circuit determined that the question was not whether juror names can be withheld, but rather what circumstances justify either deferred disclosure of juror names or keeping juror names secret. *U.S. v. Blagojevich,* 612 F.3d 558, 561 (7th Cir. 2010). According to research published by Blue's Guide to Jury Selection, there is a growing acceptance in federal court of anonymous juries for the attendant safety and protection accorded to jurors. Federal Courts have upheld the use

of anonymous juries in the six circuits including the D.C. circuit.[2] From the present day trial of Mexican drug lord Joaquin Guzman Loera, a.k.a. El Chapo, to the early 1990's trial of the Gambino organized-crime boss John Gotti, and as far back as the 1977 trial of Harlem drug kingpin Leroy "Nicky" Barnes, anonymous juries have been utilized to protect jurors and to protect the integrity of the criminal justice system. [3]

This petition addresses both the policy and practical challenges of according increased privacy to jurors by requesting three changes. First, the proposed change to Rule 18.5 specifically prohibits any contact with prospective, seated, or deliberating jurors until they are discharged. Second, the proposed changes to Rule 22.5 gives criminal trial jurors the power to "opt out" of conversations about the case and protect their privacy in the future. Finally, the changes to Rule 32.1[4] will permit contact with a juror who has requested no contact when it is in the interests of justice.

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[2] Blue's Guide to Jury Selection, Appendix G-5, by Lisa Blue Ph.D., J.D. and Robert B. Hirschhorn, J.D., December 2016 update

[3] Alan Feuer, "*El Chapo Jurors Will Be Anonymous During Trial*", N.Y. Times, Feb. 6, 2018; Arnold H. Lubasch, "*Jurors in Gotti Case To Be Sequestered And Not Identified"*, N.Y. Times, Nov. 15, 1991.

[4] The rule regarding obtaining a court order could be a stand-alone rule with the post-trial motion rules or the appellate rules because juror contact may be an issue in either of those contexts. It is proposed as a Rule 32 addition, however, because that is the most common situation where jurors have their privacy invaded by being contacted about their service years after a case has concluded. The proposed change to Rule 22.5 cross references the procedure for obtaining a court order to remind practitioners of the procedure for obtaining an order if it is needed outside the Rule 32 context.

III. Conclusion

For all the reasons explained above the Maricopa County Attorney asks this Court to modify the criminal rules as specified in the appendix below.

Respectfully submitted this ____day of January, 2019

WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

By_____
MARK C. FAULL
CHIEF DEPUTY

APPENDIX A

RULE 18.5, ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 18.5. Procedure for Jury Selection

(a) – (i) [No Change]

(j): CONTACT WITH JURORS. A PARTY OR A PARTY'S REPRESENTATIVE MUST NOT HAVE ANY CONTACT WITH PROSPECTIVE JURORS, ALTERNATE JURORS, OR JURORS WHO HAVE NOT BEEN DISCHARGED.

RULE 22.5, ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 22.5. Discharging a Jury

(a) [No Change]

(b) Disclosures and Release from Confidentiality. When discharging a jury at the conclusion of the case, the court must advise the jurors that they are released from service. If appropriate, the court must release them from their duty of confidentiality and explain their rights regarding inquiries from counsel UNDER (C), the media, or any person.

(c) CONSENT TO INQUIRIES FROM COUNSEL.

(1) *NOTICE OF RIGHTS.* UPON DISCHARGE THE COURT MUST INFORM JURORS THAT THEY MAY AGREE OR REFUSE TO SPEAK WITH

THE PARTIES ABOUT THE CASE. THE COURT MUST ALSO INFORM THE JURORS THAT IF THEY AGREE, THE PARTIES MAY SPEAK TO THEM ABOUT THE CASE NOW OR AT SOME TIME IN THE FUTURE AND IF THEY REFUSE THE PARTIES MUST NOT TALK TO THEM ABOUT THE CASE WITHOUT A COURT ORDER. EVEN IF A JUROR AGREES TO SPEAK THEY CAN DECIDE TO END ANY CONVERSATION AT ANY TIME.

(2) *DECISION ON THE RECORD.* EACH JUROR'S OPTION MUST BE RECORDED EITHER BY POLLING EACH JUROR ON THE RECORD OR USING A WRITTEN FORM WHICH WILL THEN BE FILED WITH THE CLERK.

(3) *REFUSAL.* A PARTY OR ANY PERSON ACTING ON BEHALF OF A PARTY MAY NOT CONTACT A JUROR WHO HAS REFUSED TO SPEAK TO DISCUSS ANY ASPECT OF JURY SERVICE WITHOUT A COURT ORDER AS PROVIDED IN RULE 32.1.

RULE 32.1, ARIZONA RULES OF CRIMINAL PROCEDURE

RULE 32.1: Scope of Remedy

Petition for Relief. [No Change]

Of-Right Petition. [No Change]

Grounds for Relief. [No Change]

JURORS WHO REFUSED POST-VERDICT CONTACT.

(a) *GENERALLY*. IF A JUROR REFUSED CONTACT UNDER RULE 22.5(C), NO PARTY OR ANYONE ON BEHALF OF ANY PARTY MAY HAVE ANY CONTACT WITH THAT JUROR TO DISCUSS ANY ASPECT OF JURY SERVICE, UNLESS THE COURT ISSUES AN ORDER AUTHROIZING THE CONTACT.

(b) *RIGHT TO RESPOND.* ALL PARTIES HAVE THE RIGHT TO RESPOND TO ANY MOTION SEEKING A COURT ORDER FOR CONTACT UNDER THIS RULE.

(c) *NATURE OF THE ORDER.* THE COURT MAY ISSUE AN ORDER PERMITTING THE JUROR CONTACT ONLY UPON A SHOWING OF GOOD CAUSE. ANY ORDER PERMITTING CONTACT MUST SPECIFY THE GOOD CAUSE FOUND AND DEFINE THE SCOPE OF PERMISSIBLE CONTACT.

ARIZONA VOICE FOR CRIME VICTIMS
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IN THE ARIZONA SUPREME COURT

IN THE MATTER OF: PETITION TO AMEND THE ARIZONA RULES OF CRIMINAL PROCEDURE	R- 19-0016 PETITION TO AMEND THE ARIZONA RULES OF CRIMINAL PROCEDURE

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Voice for Crime Victims (AVCV) respectfully submits this petition to amend the Arizona Rules of Criminal Procedure by integrating the rights guaranteed to victims by our constitution, Ariz. Const. art. II, § 2.1, and its implementing legislation, Ariz. Const. art. II, §§ 2.1(D) and A.R.S. §§ 13-4401-42, throughout each applicable rule provision and repealing Rule 39. AVCV's proposed amendments are attached to this petition.

Arizona Voice for Crime Victims (AVCV), founded in 1996, is a non-profit organization located in Phoenix, Arizona that provides pro bono legal representation and social services to victims of crime in state and federal criminal proceedings. AVCV seeks to foster a fair and compassionate justice system in which all crime victims are informed of their rights under the Arizona Victims' Bill of Rights (VBR), fully understand their rights, and have a meaningful way to participate and assert these constitutional guarantees throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. A key part of AVCV's mission is working to give the judiciary information and policy insights that may be helpful in ensuring that victims' rights are upheld by educating the judiciary of the practical day-to-day application of victims' rights in their courtrooms. When criminal court judges and the attorneys involved in each criminal case fully understand when and how victims' rights apply in each situation, victims can truly have the meaningful participation that the VBR intended.

Currently, Rule 39 of the Arizona Rules of Criminal Procedure generally addresses victims' rights. Rule 39 was adopted "in response to the growing perception that victims of crime [were] encountering serious problems with the criminal justice system." Ariz. R. Crim. P. 39 cmt. (1989). Attempting to "ameliorate, if possible, the problems encountered by victims," the Court adopted

Rule 39 in the hope it would "comprehensively" address the concerns of victims. *Id.* After voters adopted the VBR in November 1990, Rule 39 had to be amended to conform to the mandates of the state constitution. Rule 39, however, still only provides an overview of what rights crime victims are entitled to. Unlike the rights of the accused or the rights of the state, which are appropriately and carefully presented in the criminal rules, Rule 39 does not provide proper guidance to trial courts and attorneys on when victims' rights apply in relation to the remainder of the Rules. A comprehensive approach to victims' rights will require full integration into the Rules so that trial courts and attorneys are properly instructed on what the VBR mandates in each situation.

Proposition 104 aimed to change the criminal justice culture for victims in Arizona by providing constitutional rights that would take victims from the sidelines of the criminal justice system to becoming active participants. Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421 (2015). Notably, Proposition 104 received overwhelming support of Arizona's voters and the Arizona Victims' Bill of Rights (VBR) became effective on November 27, 1990. Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 Ariz. St. L.J. 531, 532 (2002). The VBR enumerated specific rights to justice and due process, which include rights:

1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.

3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.

4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.

5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.

6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.

7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.

8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.

9. To be heard at any proceeding when any post-conviction release from confinement is being considered.

10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.

11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

12. To be informed of victims' constitutional rights.

Ariz. Const. art. II, §§ 2.1(A)(1)-(12)

Integrating victims' rights into each applicable rule would be consistent with the rights established in paragraph 11 of the VBR, namely that "*all rules* governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights." (emphasis added.) Ariz. Const. art. II., § 2.1(A)(11). Full integration of victims' rights into each applicable Rule is further justified by the very language of the VBR, which guarantees, among other things, that victims have a right to be treated with fairness, respect, and dignity throughout the criminal justice process and to have "all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights." Ariz. Const. art. II, § 2.1(A)(1). This Court has acknowledged that the VBR broadly recognizes these rights to fairness, respect, and dignity. *J.D.;M.M. v. Hegyi*, 236 Ariz. 39, 42 (Ariz. 2014). The purpose of the VBR and its implementing legislation is to provide crime victims with the "basic rights of respect, protection, participation and healing of their ordeals." *Champlain v. Sargeant*, 192 Ariz. 371, 375 (Ariz. 1998) (citing 1991 Ariz. Sess. Laws ch. 229, § 2). The constitutional mandate requiring that victims be treated with "fairness" throughout the criminal justice process can be best achieved by fully integrating victims' right into the Arizona Rules of Criminal Procedure, which, in turn, will "integrate victims into the day to day workings of the process." Paul Cassell, *Treating Crime Victims*

Fairly: Integrating Victims into the Federal Rules of Criminal Procedure, 2007 Utah L. Rev. 861, 863 (2007).

It is important to point out that in seeking integration, AVCV is not asserting that victims are parties to a criminal case nor is AVCV seeking to elevate victims to party status. Arizona case authority is clear that victims of crime are not parties to a criminal prosecution. *State v. Lamberton*, 183 Ariz. 47 (1995) (victim not an aggrieved party with standing to file her own petition for review in a Rule 32 proceeding); *Lindsay R. v. Cohen*, 236 Ariz. 565 (App. 2015) (noting VBR did not make victims parties). Although victims are not parties, they are participants with enforceable rights. AVCV merely seeks to ensure that trial courts and attorneys are aware of each applicable situation where a victim may assert a right guaranteed under the VBR or the VRIA.

Our legislature recognizes that victims have a right to meaning full participation during a criminal prosecution. A "victim has standing to seek an order, to bring a special action or to file a notice of appearance in an appellate proceeding, seeking to enforce any right to challenge an order denying any right..." A.R.S. § 13-4437(A); *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560, 566 (App. 2015) (A request for an order in a criminal case must be timely, in writing, served and filed with the court. For victims, the subject matter of such a request is limited and must be directed to enforcing any right or to challenging an

order denying any right guaranteed to victims). Additionally, "on the filing of a notice of appearance, counsel for the victim shall be endorsed on all pleadings and, if present, be included in all bench conferences and in chambers meetings and sessions with the trial court that directly involve a victim's right..." A.R.S. § 13-4437(D). Because victims have participatory rights, it is essential that Arizona's trial courts and attorneys are provided proper guidance through this Court's rule making authority regarding when victims' rights apply in relation to the remainder of the Rules. This guidance is generally lacking in Rule 39 which plainly states what rights victims have, but it gives little direction of how each individual right should be applied in various situations. Integration, on the other hand, will specifically lay out when victims' rights are implicated and must be considered throughout the criminal justice process.

Maintaining Rule 39 would only continue to provide a general overview of victims' rights and welcome misunderstanding of their applicability by trial courts and attorneys. Full integration of the VBR into the applicable Rules would not create new victims' rights or violate the rights of the accused. Rather, it would give effect to the VBR by allowing victims meaningful participation into the day-to-day workings of the process. Additionally, full integration would provide comprehensive guidance to criminal justice professionals using the constitutional and statutory mandates that already exist. Ensuring each applicable rule fully

complies with the constitutional and statutory provisions will safeguard the rights of crime victims, especially for the majority who do not have the benefit of their own counsel.

Arizona has traditionally been on the forefront of victims' rights. It was one of the first states in the country to provide victims of crime with constitutional rights. Harrison, 34 Ariz. St. L.J. at 532 (2002). Since then, this Court has been tasked with balancing the rights of victims with those of the accused and has addressed issues of first impression that have both protected and upheld victims' rights in Arizona and provided guidance to other jurisdictions in the country. AVCV asks the Court to leave a legacy for future criminal justice professionals by fully integrating victims' rights throughout the Arizona Rules of Criminal Procedure and providing victims the medium needed to have meaningful participation throughout the entire criminal justice process.

Respectfully submitted January 10, 2019.
ARIZONA VOICE FOR CRIME VICTIMS

BY: __/s/_____
COLLEEN CLASE

(b) Suspension of an Appeal.

(1) ***Generally.*** An appellate court on motion or on its own, after considering the rights of the victim including the right to prompt and final conclusion of the case after conviction and sentence, may suspend an appeal if a motion under Rule 24 or a petition under Rule 32 is pending to permit the superior court to decide those matters.

(2) ***Notice.*** If an appeal is suspended, the appellate clerk must notify the parties, the superior court clerk, and, if certified transcripts have not yet been filed, the certified reporters or transcribers.

(3) ***Later Notification.*** No later than 20 days after the superior court's decision on the Rule 24 motion or Rule 32 petition, the appellant must file with the appellate clerk either a notice of reinstatement of the appeal or a motion to dismiss the

appeal under Rule 31.24(b), and must serve a copy of such documents on all persons entitled to notice under (b)(2).

(c) New Matters. Other than a petition for post-conviction relief that is not otherwise precluded under Rule 32.2, a party to an appeal may not, without the appellate court's consent, file any new matter in the superior court later than 15 days after the appellate clerk distributes a notice under Rule 31.9(e) that the record on appeal has been filed.

(d) Computation of Time. Rule 1.3(a) governs the computation of any time period in Rule 31, an appellate court order, or a statute regarding a criminal appeal, except that 5 calendar days are not added to the time for responding to an electronically served document.

(e) Modifying a Deadline. A party seeking to modify a deadline in the appellate court must obtain an appellate court order authorizing the modified deadline. For good cause and after considering the rights of the victim, an appellate court may shorten or extend the time for doing any act required by Rule 31, a court order, or an applicable statute.

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

(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 "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 or the Supreme Court, the superior court clerk must file it in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice 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 defense counsel or a defendant, if self-represented. 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 no later than 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 Rules 6.5 and 6.8 and A.R.S. § 13-4041. 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 court 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 who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041.

(2) *Noncapital Cases.* No later than 15 days after the filing of a notice of a defendant's timely or first Rule 32 proceeding, the presiding judge must appoint counsel for the defendant if: (A) the defendant requests it; and (B) the judge has previously determined that the defendant is indigent or the defendant has completed an affidavit of indigency. 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 no later than 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 no later than 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 For good cause and after considering the rights of the victim, including the right to a prompt and final conclusion of a case after conviction and sentence, 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 no later than 60 days after the date of appointment. A defendant without counsel must file a petition no later than 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 and after considering the rights of the victim, including the right to a prompt and final conclusion of a case after conviction and sentence, 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. The notice should include a summary of the facts and procedural history of the case, including appropriate citations to the record. The notice also must identify the specific materials that counsel reviewed, the date when counsel provided the record to the defendant, and the contents of the record provided. After counsel files a notice, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the Rule 32 proceeding unless the court orders otherwise.

(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.

(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 court or 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 no later than 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.

Rule 32.6. Response and Reply; Amendments; Review

(a) State's Response. The State must file its response no later than 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 and after considering the rights of the victim,

including the right to a prompt and final conclusion of a case after conviction and sentence. The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations.

(b) Defendant's Reply. No later than 15 days after a response is served, the defendant may file a reply. The court may for good cause grant an extension of time, after considering the rights of the victim, including the right to a prompt and final conclusion of a case after conviction and sentence,

(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.

(2) *Setting a Hearing.* If the court does not summarily dismiss the petition, it must set a status conference or hearing within 30 days on those claims that present a material issue of fact. The court also may set a hearing on those claims that present only a material issue of 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 39. Victims' Rights**~~

~~**(a) Definitions and Limitations.**~~

~~(1) *Criminal Proceeding.* As used in this rule, a "criminal proceeding" is any matter scheduled and held before a trial court, telephonically or in person, at which the defendant has the right to be present, including any post-conviction matter.~~

~~(2) *Identifying and Locating Information.* As used in this rule, "identifying and locating information" includes a person's date of birth, social security number, official state or government issued driver license or identification number, the person's address, telephone number, email addresses, and place of employment.~~

~~(3) *Limitations.*~~

~~(A) Cessation of Victim Status. A victim retains the rights provided in these rules until~~