Rule 32 Task Force

Meeting Agenda

Friday, August 3, 2018

10:00 a.m. to 4:00 p.m.

State Courts Building * 1501 West Washington * Conference Room 119 * Phoenix, AZ

Item no. 1	**Call to Order** **Introductory remarks**	*Hon. Joseph Welty, Chair*
Item no. 2	**Approval of March 23, 2018 meeting minutes**	*Judge Welty*
Item no. 3	**Workgroup reports and discussion of proposed revisions** **Workgroup 1:** - Preclusion - Discovery - *Diaz* and *Goldin* issues - Privilege and confidentiality waivers - Subject matter jurisdiction - Illegal sentences and preclusion **Workgroup 2:** - Anders-type review - *Mata* issues - Notice to appellate court on suspension - Content of notice - Time limit for filing notice and petition - *Whitman* issue **Workgroup 3:** - Competence - Rule 32.1 redrafting "of right" language - Extensions to file a petition for review - Rule 32.4(c) expansion of extension time frames - Notice of change of judge (10.2) - Rule 6.8 amendment to mandate the assignment of two lawyers in capital PCRs.	*All* *Mr. Euchner* *Judge Cattani* *Judge Johnson*
Item no. 4	**Roadmap** - **Next meeting: August 31, 2018**	*Judge Welty*
Item no. 5	**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: March 23, 2018

Members attending: Hon. Joseph Welty (Chair), Hon. James Beene, Hon. Cathleen Brown Nichols, Hon. Kent Cattani, Hon. Peter Eckerstrom, David Euchner (by telephone), Jennifer Garcia, Hon. Kellie Johnson, Dan Levey, Michael Mitchell, Hon. Samuel Myers, David Rodriquez, Hon. James Sampanes, Mikel Steinfeld (by telephone), Lacey Stover Gard, Hon. Danielle Viola, Hon. Rick Williams

Absent: Timothy Agan, Jason Kreag

Guests: Chief Justice Scott Bales, George Papa, John P. Todd, Tim Geiger, Kathryn Andrews

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

1. Call to order; introductions; remarks from the Chief Justice. Judge Myers, acting on behalf of the Chair, called the first meeting of this Task Force to order at 10:04 a.m. Judge Myers asked members and guests to introduce themselves, and Judge Welty, who had been presiding over a court proceeding, arrived during those introductions. Judge Welty then invited the Chief Justice to address the Task Force.

The Chief Justice noted that a Task Force on the Arizona Rules of Criminal Procedure had recently recommended, and the Court had adopted, comprehensive stylistic amendments to the criminal rules. However, while that Task Force saw the desirability of substantive changes to Rule 32, it did not make those changes because doing so would significantly exceed the scope of restyling. Members were selected for this Task Force based on their experience in post-conviction proceedings. The Chief Justice encouraged members to consider ways to reduce delay in the post-conviction relief process, and to make the process less cumbersome and better able to identify meritorious cases. He concluded by thanking members for their service in this endeavor.

2. Introductory remarks by the Chair. The Chair thanked the Chief Justice for his remarks. He also expressed his appreciation to Ms. Beckmann and Mr. Euchner, who prepared memos before the meeting outlining a variety of issues and concerns regarding Rule 32.

The Chair then reviewed Administrative Order number 2018-07, which established the Task Force. The Order gives the Task Force a broad charge to "identify possible substantive changes that improve upon the objectives of Rule 32 and the post-conviction relief process." Although the Chair anticipated members would propose the best possible rule for the criminal justice system, he also expects members will seek input from colleagues and vet ideas with their respective organizations. The Chair envisions most of the rule drafting will be done by workgroups, and that should necessitate fewer Task Force meetings. The Order includes a goal that the Task Force submit a rule petition by January 10, 2019. Members' terms conclude on December 31, 2019, which will allow members to reconvene after filing the petition to review public comments and to modify their rule proposal as appropriate. The Court will consider the

final version of the Task Force's proposed amendments to Rule 32 at its rules agenda in the late summer of 2019.

The Chair then requested Ms. Beckmann to summarize the issues her memo raised.

3. **Ms. Beckmann's memo.** Ms. Beckmann advised that she compiled her list of issues after speaking with other stakeholders. She added that her issues were not identified in order of importance, or presented in the sequence they appear in Rule 32.

Competence. The first issue was highlighted in a capital case, *Fitzgerald v. Myers*, 243 Ariz. 84, (2017), which held "that neither § 13-4041 nor Rule 32.5 requires a trial court to determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition." However, the Court added that a trial court may order a competency evaluation "if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, certain Rule 32 claims…." Judge Vasquez (sitting by designation) in an opinion that concurred in the result, disagreed with the majority's reasoning and "would hold that capital defendants have a right to competency in post-conviction proceedings for certain claims, such as IAC and other claims that do not appear from and cannot be presented with the existing record when those claims require a defendant's ability to effectively communicate with counsel. In my view, this is consistent with our statutes and rules, promotes justice, and causes no unnecessary delay." Ms. Beckmann noted that the defendant in this case had specifically waived a due process claim, and that both the majority and special concurrence were limited to the text of the rule.

Members then discussed whether the rule should accommodate the situation in which the defendant's lack of competency impedes counsel's ability to identify and develop a claim under Rule 32.1. One member thought a competence issue would arise only in a capital case, and that non-capital defendants would have no incentive to initiate potentially prolonged competence proceedings. Other members anticipated the issue would also arise in non-capital cases. Another member noted that the defendant's incompetence during a Rule 32 proceeding would not be disruptive if the defendant could be quickly restored, but long-term incompetence could be problematic if the petition raised substantive issues that required the defendant's testimony.

Members discussed additional issues. If the defendant was incompetent, how did facts come to light that formed a basis for the issues raised by the petition? Might there be sources other than the defendant's testimony that could prove supporting facts? If the defendant was incompetent, should the trial court stay the Rule 32 proceeding, and if so, could the stay become indefinite? What would happen if the defendant was not restored to competence? Would this concern also arise in non-capital of-right proceedings, and if so, might competence be a more acute issue in those proceedings? Might the rule include an exception to issues not raised in a previous proceeding due to defendant's incompetence?

Content of the notice. Rule 32.4(a)(3) provides: "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)." Ms. Beckmann noted that in practice, there seems to be uncertainty about what the notice must include, particularly in the first, timely notice, which is often as bare bones as a notice of appeal. Must a first, timely notice identify specific claims? Because a first notice is

analogous to a notice of appeal, should the rule require, for the first and timely notice, only a statement that the notice is timely and not successive? What should the rule require for a successive or untimely proceeding? The current rule requires the notice to contain "other information shown in Rule 41, Form 24(b)." Would the rule be clearer if it specified those requirements?

Preclusion. Ms. Beckmann noted issues about the syntax of Rule 32.2(c), but more importantly, she addressed a substantive issue. The rule provides, "The State must plead and prove any ground of preclusion by a preponderance of the evidence. A court may determine that an issue is precluded even if the State does not raise preclusion." She believes that it is contradictory or superfluous to require the State to plead and prove preclusion, but regardless of whether the State satisfies that obligation, to then permit the court to find on its own that a claim is precluded. One member noted an expectation that both sides will fulfill their respective responsibilities under Rule 32, and said that this provision allowing the court to find preclusion, notwithstanding the State's failure to plead and prove it, is anomalous. However, a judge member asked the Task Force to consider how a federal court would deal with the procedural bar of preclusion if the State did not address it.

Ms. Beckmann raised another issue regarding preclusion in item 4 of her memo. Rule 32.2(b) provides that the general rule of preclusion in Rule 32.2(a) "does not apply to claims for relief based on Rules 32.1(d) through (h)." If a defendant raises a claim in a successive or untimely proceeding under Rule 32.1(d) through (h), the rule suggests that a defendant could procedurally raise a previously adjudicated claim. Rule 32.2(b) might be rational for claims of newly discovered evidence, for example, if new evidence is discovered that was not the basis of a previously litigated claim of newly discovered evidence. But it might not be reasonable for other types of claims if it permits relitigating claims that were finally adjudicated.

Ms. Beckmann also noted an issue under Rule 32.2(a)(3), which precludes a claim that was "waived at trial." She said that the issue most commonly arises for errors that occur at sentencing, and is compounded because the judgment becomes final once the court has rendered the sentence. To avoid the issue of waiver, is the defendant required to interrupt the court when it's rendering the sentence? She referred to *State v. Vermuele*, 226 Ariz. 399 (App. 2011), which rejected the State's argument that the defendant forfeited claims of sentencing error when the defendant failed to raise the issue in the trial court and had not argued on appeal that it was a fundamental error, because the defendant had "no clear procedural opportunity to challenge the rendition of sentence before it became final"

Time limit for filing a notice and petition. A.R.S. § 13-4234(G) provides that the time limits for filing a notice and the petition "are jurisdictional and an untimely filed notice or petition shall be dismissed with prejudice." But is this inaccurate regarding the petition, since the trial court under Rule 32.4(c) can grant multiple extensions to file a petition? The Chair noted that the issue is not whether the court can expand a time limit by granting extensions, but rather its inability to do so after the limit has passed. Other issues include whether there is a conflict between the statute and the rule, and whether the matter is strictly procedural and governed solely by court rule. The Chair requested members to make appropriate rule changes, and

determine thereafter whether there would be a need for statutory changes. One member suggested that when considering time limits established by rule, members should review revisions made by the Criminal Rules Task Force to Rules 12.9 and 24.1. A judge member reminded members of the general principle that the court should avoid conflicts with the other two branches when it can. The Chair may ask Professor Kreag for guidance on identifying procedural versus substantive issues under Rule 32.

Anders-type review. In *State v. Chavez*, 243 Ariz. 313 (App. 2017), Division One rejected the defendant's argument based on *Pacheco v Ryan*, CV-15-02264-PHX-DGC, 2016 WL 7407242 (D. Ariz. Dec. 22, 2016), that a defendant has a constitutional right to an *Anders*-type review in an of-right proceeding. Judge Cattani suggested in his special concurrence in *Chavez* that "there are compelling reasons for the Arizona Supreme Court to consider modifying the procedural rules to provide for a limited *Anders*-type review in Rule 32 of-right proceedings for pleading defendants that is similar to the review currently provided on appeal for non-pleading defendants." Members agreed that if they propose such a modification, it should be clear and specific. For example, would the court need to review transcripts of proceedings, or police reports? One member noted that the 5th Circuit provides an "*Anders* checklist" of required items. The checklist requires review of specific proceedings, such as change of plea and sentencing proceedings, as well as advisements to the defendant; and it requires that defense counsel provide a summary of those proceedings to confirm that counsel has reviewed them. A judge member added that an *Anders*-type process might mitigate the workload of appellate judges.

Illegal sentences. The next issue Ms. Beckmann raised was whether an illegal sentence should be an exception to the rule on preclusion. Can such a claim ever be precluded or untimely, and if it was not properly raised, could it give rise to a claim of ineffective assistance of counsel? Ms. Beckmann reported hearing recommendations that the rule be amended to create a means for defendants in these situations to obtain relief, particularly when the defendant pled guilty believing he or she was parole-eligible. However, she acknowledged that this might require a legislative solution, and such a bill is now progressing through the Legislature. The bill, SB 1211, is limited to plea agreement cases where the defendant entered a guilty plea believing he or she was parole eligible. But while limiting the bill's application to pleading defendants is rational because it goes to the validity of a plea, it might leave non-pleading defendants without a remedy for an illegal sentence. Claims of actual innocence are allowed under Rule 32.1, but they are not provided by statute. Might a similar ground be added under Rule 32.1 to provide relief in these circumstances, and if so, could such a claim be precludable or waivable?

Mata issues. A non-pleading defendant has no constitutional right to effective Rule 32 counsel, *State v. Mata*, 185 Ariz. 319 (1996), whereas the pleading defendant does, *State v. Petty*, 225 Ariz. 369 (App. 2010); *State v. Pruett*, 185 Ariz. 128 (App. 1995). Should the rule be amended to allow a non-pleading defendant, like a pleading defendant, to have a second opportunity to raise the ineffectiveness of Rule 32 counsel in a successive proceeding? This is particularly an issue when Rule 32 counsel either failed to raise a claim of ineffective assistance of trial counsel, or did so in an inefficient manner. Case law regards claims for ineffective assistance of counsel as constitutional, and requires defendants to bring all such claims in a Rule 32 proceeding. Yet for non-pleading defendants, there appears to be no recourse when counsel is ineffective in the

Rule 32 proceeding. An amendment to Rule 32 could acknowledge *Martinez v. Ryan*, 566 U.S. 1 (2012), and mitigate the tension between federal and state cases on whether a non-pleading defendant has a constitutional right to effective assistance of Rule 32 counsel. A judge-member acknowledged that tension, but also noted a policy favoring finality.

Diaz and Goldin issues. *State v. Diaz*, 236 Ariz. 361 (2014) recognized that a criminal defendant cannot obtain post-conviction relief on a ground that has been waived in a prior post-conviction relief proceeding. Nonetheless, the Court held that "under the unusual facts of this case," the defendant did not waive his ineffective assistance of trial counsel claim when, through no fault of the defendant, his counsel failed to file petitions in two prior post-conviction relief proceedings.

In *State v. Goldin*, 239 Ariz. 12 (App. 2015), Goldin asserted he had misunderstood his sentence because of the ineffectiveness of his attorneys. He explained he had failed to raise the IAC claim in a timely or previous proceeding because he had only recently learned he had such a claim. He then argued he was entitled to relief based on newly discovered evidence as both an independent claim and interrelated with his newly discovered IAC claim. Goldin contended in his reply, "Whether Defendant's claim is based on IAC, or newly-discovered evidence, there are those exceptional cases which deserve post-conviction consideration, even if the defendant failed to raise IAC in his first Rule 32 Notice." Like the Court in *Diaz,* and based on the unusual circumstances of the case, Division Two could not find that the Goldin waived the IAC claim. The case was returned to the trial court to consider, as a timely-raised claim, whether Goldin was entitled to relief.

Ms. Beckmann noted that these cases qualify the concepts of finality and preclusion. Circumstances such as those presented in these cases invariably arise. The Chair suggested a distinction between discovery of new evidence and discovery of a new claim. Some members expressed opposition to a rule amendment that would permit a new claim based on newly discovered ineffective assistance of counsel because it would create a significant exception to the principle of finality. These members believed that although the exception might apply in a few cases, it probably would be raised in many more cases. But another member thought that Rule 32 should not incentivize defendants to file ineffective assistance of counsel claims within 90 days as a matter of course, but rather the rule should be flexible enough to allow filing when there is really an issue to litigate.

Whitman issue. *State v. Whitman*, 234 Ariz. 565 (2014) clarified that the time for filing a notice of appeal ran from the oral pronouncement of sentence, rather than when the judgment of sentence was filed, and Rule 31.2(a) was amended accordingly. To make Rule 32's provision consistent with Rule 31 and with *Whitman*, the Task Force should consider making similar clarifications to Rule 32.4(a).

Notifying the appellate court when an appeal is suspended. Rule 31.3(b) permits suspension of an appeal to allow the trial court to decide a Rule 24 or 32 issue. The provision also requires an appellant to notify the appellate court when the trial court has decided the issue. Does the rule require additional clarification about the timing, manner, and content of the notice?

Rule 32.9 extensions to file a petition for review. Criminal Rule 31.3(e) authorizes the appellate court to modify a deadline concerning an appeal, and Rule 32.9(c)(1)(D) incorporates that provision by reference. But somewhat inconsistently, Rule 32.9(c)(3) requires a motion to extend time for filing a petition for review to be filed in and decided by the trial court. The Task Force should consider harmonizing these provisions.

4. **Mr. Euchner's memo.** The Chair then asked Mr. Euchner to summarize his memo. Mr. Euchner noted that Ms. Beckmann fully or partially addressed many of the items in his memo. But before proceeding to his other items, Mr. Euchner made a few general requests regarding drafting. First, he asked that members not use the same term if it has more than one meaning in different contexts. Conversely, he asked that they not use different terms that have the same meaning. Finally, he asked that rules provide clear guidance, for example, that something "probably" would have changed a result, rather than "might have" changed it.

Privilege and confidentiality. Mr. Euchner suggested adding a provision, perhaps in Rule 32.4, reciting that the filing of a notice waives privilege and confidentiality issues and allows predecessor counsel to communicate on otherwise privileged matters with successor counsel.

Subject matter jurisdiction. Mr. Euchner suggested that the rule on preclusion should exclude a lack of subject matter jurisdiction, and that a defendant should be able to raise at any time an issue that the court had no power to act.

Discovery. Citing an issue in *Canion v. Cole,* 210 Ariz. 598 (2005), Mr. Euchner recommended that Rule 32 address discovery, including a standard, e.g., substantial need, for the trial court to allow discovery. During the ensuing discussion, members agreed that if a portion of defense counsel's file is unavailable, prosecutors customarily attempt to provide the omitted materials to defendant. But sometimes, materials are lost and neither side has access to them. Another member noted that defendants might make public records requests during Rule 32 proceedings, especially in capital cases; but if the request is disputed, a civil judge, not the Rule 32 judge, is empowered to resolve the dispute. The member would like a Rule 32 amendment that authorizes the Rule 32 judge to hear the issue.

Change of judge. Mr. Euchner noted that when a Rule 32 proceeding can no longer be assigned to the original judge, e.g., because of the judge's retirement, counties have different local practices for reassigning the case. Mr. Euchner proposed that this should be standardized by a Rule 32 amendment. In addition, if the case is assigned to a new judge, and the defendant has never exercised a Rule 10.2 notice, Mr. Euchner requested that a Rule 32 amendment should specify that the defendant is entitled to a peremptory change of judge.

Separate rule set for post-conviction proceedings. Mr. Euchner also proposed a freestanding set of rules for criminal appeals and post-conviction proceedings, analogous to the Arizona Rules of Civil Appellate Procedure. Considering that civil appeals are governed by a distinct set of rules, he believes that post-conviction rules in criminal cases also should be separate from the trial court rules.

5. **Additional comments.** The Chair then asked members for additional suggestions, and members offered the following comments.

Rule 32.1. The Task Force should consider better nomenclature for an "of-right" petition, a term that many stakeholders find unclear and confusing. The Task Force might also consider separate rules or sections that govern post-conviction proceedings for defendants who have entered a plea, and for defendants who were found guilty at trial.

Rule 32.1(h). A pending capital case, *State v. Miles* (CR-16-0021-PC), raises an issue about the application of Rule 32.1(h). The Task Force should be alert for a decision in this case.

Rule 32.4(c). Rule 32.4(c) requires a defendant in a capital case to file a petition within 12 months after filing a first notice. The rule permits the court to grant one 60-day extension and 30-day extensions thereafter, but requires the defendant to file a status report with the Supreme Court every 60 days until the petition is filed. This member suggested that the rule should allow the trial court to grant longer extensions. For example, if defendant needs five months to obtain an expert's report, defense counsel should request an extension for that time and not be required to file multiple interim requests. Additionally, the requirement of a status report may be an unnecessary burden on defense counsel, and might have minimal benefit to the Supreme Court.

Rule 6.8. A member proposed an amendment to Rule 6.8 that would require the automatic assignment of two attorneys to a capital post-conviction proceeding. A second attorney is currently assigned only on a showing of need.

6. **Workgroups and future meeting dates.** The Chair observed that today's discussion should provide a solid foundation for moving forward. He reminded members that the initial drafting of rule amendments would be done by workgroups. After discussion, the Chair agreed to compose workgroups that were geographically diverse. The Chair further advised that there will be three workgroups, with six members and a lead point-of-contact for each. He will assign issues to the workgroups, and each workgroup should be prepared to present proposed amendments at the next Task Force meeting. The Chair also requested members to note proposed rule amendments that might be inconsistent with corresponding statutes, and which might require statutory amendments.

A date for the second meeting was not set, but the Chair will discuss this further with staff and notify members of the date. The assignment of members to workgroups, and the matters assigned to each workgroup, also will be forthcoming.

7. **Call to the public.** Mr. George Papa responded to a call to the public and expressed his concern that a post-conviction proceeding is assigned to the original judge rather than to a new judge.

8. **Adjourn.** The meeting adjourned at 1:40 p.m.

Rule 32. Post-Conviction Relief

Rule 32.1. Scope of Remedy

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

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

Grounds for Relief. Grounds for relief are:

(a) the defendant's conviction was obtained or the sentence was imposed in violation of the United States or Arizona constitutions;

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

(c) the sentence imposed exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

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

(e) newly discovered material facts probably exist and those facts probably would have changed the verdict or sentence.

Newly discovered material facts exist if:

(1) the facts were discovered after the trial or sentencing;

(2) the defendant exercised due diligence in discovering these facts; and

(3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of critical significance such that the evidence probably would have changed the verdict or sentence.

(f) the failure to timely file (1) a notice of appeal, (2) a first notice of post-conviction relief, (3) a notice of post-conviction relief of-right, or (4) a notice challenging the effectiveness of Rule 32 counsel in an of-right petition for post-conviction relief was not the defendant's fault;

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

(h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt, or that no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752. [Lacey's suggested edits, derived from *Sawyer v. Whitley*, 505 U.S. 333 (1992).]

COMMENT

Rule 32. l(a). Most traditional collateral attacks are encompassed within this provision. Claims of denial of counsel, of incompetency of counsel, and of violation of other rights based on the federal or Arizona constitutions are included.

Rule 32. l(b). This provision retains the basic attack on jurisdiction universally recognized as a ground for collateral attack.

Rule 32.l(c). This provision is intended to allow an attack on a sentence even though the petitioner does not contest the validity of the underlying conviction.

Rule 32.1(d). This provision is not intended to include attacks on the conditions of imprisonment or on correctional practices or prison rules. It is intended to include claims of more traditional types-- e.g., miscalculation of sentence, questions of computation of good time- which result in the defendant remaining in custody when he should be free. Appeals from the conviction and imposition of probation must be filed no later than 20 days of the entry of judgment and sentence. *See* Rules 26.1, 26. l 6(a), and 31.2.

Rule 32.l(f). This provision includes the situation in which the trial court failed to advise the defendant of rights to review under Rule 26.11(a). It also includes situations in which the defendant intended to pursue an appeal or post-conviction relief and thought a timely notice had been filed ~~by defendant's attorney~~ when in reality it had not.

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

to 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 based on any ground:

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

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

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

(b) Exceptions. Rule 32.2(a) does not apply to claims for relief based on Rule 32. l(d) through (h). A claim under Rule 32. l(d) through (h) that defendant raises in a successive or untimely post-conviction notice must include the specific exception to preclusion and explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not identify a specific exception or provide reasons why defendant did not raise the claim in a previous petition or in a timely manner, the court may summarily dismiss the notice.

(c) Standard of Proof. The State must plead and prove any ground of preclusion by a preponderance of the evidence. A court may determine that an issue is precluded even if the State does not raise preclusion.

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

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

(b) Habeas Corpus. If a court having jurisdiction over a defendant's person receives an application for a writ of habeas corpus raising any claim that attacks the validity of the defendant's conviction or sentence, and if that court is not the court that convicted or sentenced the defendant, it must transfer the application to the court where the defendant was convicted or

sentenced. The court to which the application is transferred must treat the application as a Rule 32 petition for post-conviction relief, and the court and all parties must apply Rule 32's procedures.

COMMENT

This 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 require that courts "determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition," but courts retain the discretion to order a competency evaluation "if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, [the petition]." *See Fitzgerald v. Myers*, 243 Ariz. 84 (2017).

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. (statutes governing habeas corpus). The rule is intended to provide a standard procedure for accomplishing the objectives of all constitutional, statutory, or common law post-trial writs and remedies except a writ of habeas corpus.

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

(a) Notice of Post-Conviction Relief.

(1) ***Filing.*** A defendant starts a post-conviction proceeding by filing a notice of post-conviction relief in the court where the defendant was convicted. The court must make "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. l(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 oral pronouncement of sentence. A defendant may raise a 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 oral pronouncement of sentence or no later than 30 days after the issuance of the order and mandate in the direct appeal, whichever is later. [Lacey's suggested edits.]

(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 within 5 days of its filing, and must note in the record the date and manner of sending the copy.

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

of post- conviction proceedings.

(b) Appointment of Counsel.

(1) ***Capital Cases.*** After the Supreme Court has affirmed a capital defendant's conviction and sentence, it must appoint counsel, ~~[and may appoint co-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. On application and if the trial court finds that such assistance is reasonably necessary, it may appoint co-counsel, and it may appoint an investigator, expert witnesses, and a mitigation specialist under Rule 6.7, at county expense.

(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, 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, 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; Defendant's Pro Se Petition. [proposed by Mikel Steinfeld] In a Rule 32 proceeding, counsel must investigate the defendant's case for any and all colorable claims.

(1) *Counsel's Notice of No Colorable Claims.* <u>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:</u>

(A) <u>a summary of the facts and procedural history of the case;</u>

(B) the specific materials that counsel reviewed;

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

(D) the date(s) counsel discussed the case with the defendant; and

(E) the information specified in subpart (d)(2) or (d)(3), as applicable.

(2) *No Colorable Claims: Petition from a Change of Plea.* A subpart (d)(1) notice in a petition from a change of plea should also identify the following:

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

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

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

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

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

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

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

(H) the sentence imposed by the court; and

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

A notice filed in a petition from a change of plea must also include or incorporate Form ___, with citations to the pertinent portions of the record.

(3) *No Colorable Claims: Petition from a Trial.* A subpart (d)(1) notice in a petition from a bench or jury trial should also identify the following:

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

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

(C) 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);

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

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

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

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

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

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

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

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

(L) the sentence imposed by the court;

(M) issues raised by appellate counsel; and

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

(4) *Defendant's Pro Se Petition.* Upon receipt of counsel's notice under subpart (d)(1), the defendant may file a petition on his or her own behalf, and 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.

(5) *Counsel's Duties After Filing a Notice Under Subpart (d)(1).* After counsel files a notice under subpart (d)(1) 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

Rule 32 proceeding.

Sources for additions:

- Third Circuit Court of Appeals Guidelines http://www.ca3.uscourts.gov/sites/ca3/files/ANDERS%20GUIDELINES%203dCir.pdf and Checklist http://www.ca3.uscourts.gov/sites/ca3/files/ANDERS%20CHECKLIST.pdf.
- Fifth Circuit Court of Appeals Guidelines http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/andersguidelines.pdf and Checklist http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/anderschecklist.pdf.
- Texas 13th Court of Appeals Guidelines: http://www.txcourts.gov/13thcoa/practice-before-the-court/anders-guidelines/.
- Texas 14th Court of Appeals Guidelines www.txcourts.gov/media/883046/andersguidelines-revised-post-kelly-.pdf and Checklist http://www.txcourts.gov/media/183744/anders-checklist.pdf.

(e) **Attorney-Client Privilege and Confidentiality for the Defendant. [Proposed by David Euchner]** Upon the appointment of counsel for a defendant in a post-conviction proceeding, the defendant's prior counsel must share all files and other communications with post-conviction counsel. Neither the attorney-client privilege nor any other claim to privilege or confidentiality is affected by the sharing of information among the defendant's predecessor and successor counsel.

(f) **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.

(g) 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.

(h) Stay of Execution of a Death Sentence on a Successive Petition. Once the defendant has received a sentence of death and the Supreme Court has fixed the time for executing the sentence, the trial court may not grant a stay of execution if the defendant files a successive petition. In those circumstances, the defendant must file an application for a stay with the Supreme Court, and the application must show with particularity any claims that are not precluded under Rule 32.2. If the Supreme Court grants a stay, the Supreme Court clerk must notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

COMMENT

Rule 32.4(a). If a petition is filed while an appeal is pending, the appellate court, under Rule 31.3(b), may stay the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment or sentence. *See* Rule 3 l .4(b) (requiring consolidation unless good cause exists not to do so).

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

(a) Form of Petition. A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.

(b) Length of Petition. In Rule 32 of-right and noncapital cases, the petition must not exceed 28 pages. The State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages. In capital cases, the

petition must not exceed 80 pages. The State's response must not exceed 80 pages, and defendant's reply must not exceed 40 pages.

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

(e) Effect of Non-Compliance. The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 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.

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. 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.

(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 32.7. Informal Conference

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

(b) Capital Cases. In a capital case, the court must hold an informal conference no later than 90 days after counsel is appointed on the first notice of a petition for post- conviction relief.

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

Rule 32.8. Evidentiary Hearing

(a) Rights Attendant to the Hearing; Location; Record. The defendant is entitled to a hearing to determine issues of material fact and has the right to be present and to subpoena witnesses for the hearing. The court may order the hearing to be held at the defendant's place of confinement if facilities are available and after giving at least 15 days' notice to the officer in charge of the confinement facility. In superior court proceedings, the court must make a verbatim record.

(b) Evidence. The Arizona Rules of Evidence applicable 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 32.9. Review

(a) Filing of a Motion for Rehearing.

(1) ***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.

(2) ***Response and Reply.*** An opposing party may not file a response to a motion for rehearing unless the court requests one, but the court may not grant a motion for rehearing without requesting and considering a response. If a response is filed, the moving party may file a reply no later than 10 days after the response is served.

(3) ***Effect on Appellate Rights.*** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under (c).

(b) Disposition if Motion Granted. If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing or grant a new hearing

and then either amend or reaffirm its previous ruling. In either case, it must state its reasons for amending a previous ruling. The State must notify the victim of any action taken by the court if the victim has requested notification.

(c) Notification to the Appellate Court. If an appeal of a defendant's conviction or sentence is pending, the court must send a copy of any of its rulings granting or denying relief on the defendant's notice or petition for post-conviction relief, or any motion for rehearing, to the appellate court within 10 days after the ruling is filed. Defendant's counsel, or if defendant is self-represented, the defendant, also must file a notice in the appellate court informing that court whether the trial court granted or denied relief.

(d) Petition and Cross-Petition for Review.

(1) Time and Place for Filing.

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

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

(C) *Place for Filing.* The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.

(D) *Computation of Time and Modifying Deadlines.* Rule 31.3(d) governs the computation of any appellate court deadline in this rule, and an appellate court may modify any deadline in accordance with Rule 31.3(e).

(2) *Notice of filing and Additional Record Designation.* No later than 3 days after a petition or cross-petition for review is filed, the petitioner and cross-petitioner must file with the trail court a "notice of filing." The notice of filing may designate additional items for the record described in (e). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.4(e), or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition for review.

(3) ***Motions.*** Motions for extensions of time to file petitions or cross-petitions for review must be filed with the trial court, which must

decide the motions promptly. The parties must file all other motions in the appellate court.

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

(A) *Form and Length.* Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(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 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.

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

(i) copies of the trial court's rulings entered under Rules 32.6(d), 32.8(d) and 32.9(b);

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

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

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

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

(D) *Waiver.* A party's failure to raise any issue that could be raised in the petition or cross-petition for review constitutes a waiver of appellate review of that issue.

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

(6) [Lacey's suggested edits.]Service; Response; Reply.

(A) *Service.* A party filing a petition, cross-petition, appendix, response, reply, or a related filing must serve a copy of the filing on all other parties. The serving party must file a certificate of service complying with Rule l.7(c)(3), identifying who was served and the date and manner of service.

(B) *Response.* 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. 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 (c)(4)(A). An appendix to a response must comply with the form and substantive requirements in (c)(5).

(C) *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 form requirements in (c)(4)(A) and may not include an appendix.

(7) ***Amicus Curiae.*** Rules 3 l. l 3(a)(7) and 31.15 govern filing and responding to an amicus curiae brief.

(e) Stay Pending Review. The State's filing of a motion for rehearing or 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 or the appellate court.

(f) Transmitting the Record to the Appellate Court. No later than 45 days after receiving a notice of filing under (c)(2), the trial court clerk must transmit the record. The record includes copies of the notice of post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, and any exhibits admitted by the trial court in the post-conviction proceedings.

(g) [Lacey's suggested edits.]**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.

(h) 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 (f).

(i) Return of the Record. After a petition for review is resolved, the appellate clerk must return the record to the trial court clerk for retention.

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

Rule 32.10. Review of an Intellectual Disability Determination in Capital Cases 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 32.11. Extensions of Time; Victim Notice and Service

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

(b) Manner and Timing of Service or Notice.

(1) *Victim's Choice of the Manner of Service.* The victim may specify in the notice of appearance whether the service of the request should be 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.

(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 32.12. Post-Conviction Deoxyribonucleic Acid Testing

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

(1) in the possession or control of the court or the State;

(2) related to the investigation or prosecution that resulted in the judgment of conviction; and

(3) that may contain biological evidence.

(b) Manner of Filing; Response. The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 32.4(a)(4). The State must respond to the petition 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) ***Mandatory Testing.*** After considering the petition and the State's response, the court must order DNA testing if the court finds that:

(A) a reasonable probability exists that the defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

(B) the evidence is still in existence; and

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

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

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

(B) DNA testing will produce exculpatory evidence.

(3) ***Laboratory; Costs.*** If the court orders testing under (d)(l) or (2), the court must select an accredited laboratory to conduct the testing. The court may require the defendant to pay the costs of testing.

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

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

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

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

(e) Test Results.

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

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

(f) **Preservation of Evidence.** If a defendant files a petition under this rule, the court must order the State to preserve during the pendency of the

proceeding all evidence in the State's possession or control that could be subjected to DNA testing. The State must prepare an inventory of the evidence and submit a copy of the inventory to the defendant and the court. If evidence is destroyed after the court orders its preservation, the court may impose appropriate sanctions, including criminal contempt, for a knowing violation.

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

(1) notifying the Board of Executive Clemency or a probation department;

(2) requesting to add the defendant's sample to the federal combined DNA index system offender database; or

(3) notifying the victim or the victim's family.

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

Rule 32. Post-Conviction Relief

Rule 32.1. Scope of Remedy

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

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

Grounds for Relief. Grounds for relief are:

(a) the defendant's conviction was obtained or the sentence was imposed in violation of the United States or Arizona constitutions;

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

(c) the sentence imposed exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

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

(e) newly discovered material facts probably exist and those facts probably would have changed the verdict or sentence.

Newly discovered material facts exist if:

(1) the facts were discovered after the trial or sentencing;

(2) the defendant exercised due diligence in discovering these facts; and

(3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of critical significance such that the evidence probably would have changed the verdict or sentence.

(f) the failure to timely file (1) a notice of appeal, ~~a notice of post-conviction relief of right~~ (2) a first notice of post-conviction relief, (3) a notice of post-conviction relief of-right, or (4) a notice challenging the effectiveness of Rule 32 counsel in an of-right petition for post-conviction relief ~~or a~~

~~notice of appeal within the required time~~ was not the defendant's fault;

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

(h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt, or that no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752.~~the death penalty would not have been imposed.~~ [Lacey's suggested edits, derived from *Sawyer v. Whitley*, 505 U.S. 333 (1992).]

COMMENT

Rule 32. l(a). Most traditional collateral attacks are encompassed within this provision. Claims of denial of counsel, of incompetency of counsel, and of violation of other rights based on the federal or Arizona constitutions are included.

Rule 32. l(b). This provision retains the basic attack on jurisdiction universally recognized as a ground for collateral attack.

Rule 32.l(c). This provision is intended to allow an attack on a sentence even though the petitioner does not contest the validity of the underlying conviction.

Rule 32.1(d). This provision is not intended to include attacks on the conditions of imprisonment or on correctional practices or prison rules. It is intended to include claims of more traditional types-- e.g., miscalculation of sentence, questions of computation of good time- which result in the defendant remaining in custody when he should be free. Appeals from the conviction and imposition of probation must be filed no later than 20 days of the entry of judgment and sentence. *See* Rules 26.1, 26. l 6(a), and 31.2.

Rule 32.l(f). This provision includes the situation in which the trial court failed to advise the defendant ~~fails to appeal because the trial court, despite the requirements~~ of rights to review under~~of~~ Rule 26.1 ~~1~~1(a)~~(1),.~~ ~~did not advise him of his appeal rights, and the~~ It also includes situations in which the defendant intended to pursue an appeal or post-conviction relief and thought a

timely notice ~~appeal~~ had been filed ~~by his defendant's attorney~~ when in reality it had not.

Rule 32. l(h). This claim is independent of a claim under Rule 32.1(e). A defendant who establishes a claim of newly discovered evidence does not need to 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 based on any ground:

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

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

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

(b) Exceptions. Rule 32.2(a) does not apply to claims for relief based on Rule 32. l(d) through (h). A claim under Rule 32. l(d) through (h) that defendant raises in a successive or untimely post-conviction notice must include the specific exception to preclusion and explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not identify a specific exception or provide reasons why defendant did not raise the claim in a previous petition or in a timely manner, the court may summarily dismiss the notice.

(c) Standard of Proof. The State must plead and prove any ground of preclusion by a preponderance of the evidence. A court may determine that an issue is precluded even if the State does not raise preclusion.

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

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

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

COMMENT

This 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 require that courts "determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition," but courts retain the discretion to order a competency evaluation "if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, [the petition]." *See Fitzgerald v. Myers*, 243 Ariz. 84 (2017).

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. (statutes governing habeas corpus). The rule is intended to provide a standard procedure for accomplishing the objectives of all constitutional, statutory, or common law post-trial writs and remedies except a writ of habeas corpus.

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

(a) Notice of Post-Conviction Relief.

(1) ***Filing.*** A defendant starts a post-conviction proceeding by filing a notice of post-conviction relief in the court where the defendant was convicted. The court must make "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. l(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~~ oral pronouncement of sentence. A defendant may raise ~~an of-right~~ a 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~~ oral pronouncement of sentence or no later than 30 days after the issuance of the order and mandate in the direct appeal, whichever is later. [Lacey's suggested edits.]

(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~~ within 5 days of its filing, and must note in the record the date and manner of sending the copy.

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

(b) Appointment of Counsel.

(1) ***Capital Cases.*** After the Supreme Court has affirmed a capital defendant's conviction and sentence, it must appoint counsel, ~~[and may appoint co-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. On application and if the trial court finds that such assistance is reasonably necessary, it may appoint co-counsel, and it may appoint an investigator, expert witnesses, and a mitigation specialist under Rule 6.7, at county expense.

(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, 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, 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.~~

(d) Duty of Counsel; Defendant's Pro Se Petition. [proposed by Mikel Steinfeld] In a Rule 32 proceeding, counsel must investigate the defendant's case for any and all colorable claims.

(1) *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:

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

(B) the specific materials that counsel reviewed;

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

(D) the date(s) counsel discussed the case with the defendant; and

(E) the information specified in subpart (d)(2) or (d)(3), as applicable.

(2) *No Colorable Claims: Petition from a Change of Plea.* A subpart (d)(1) notice in a

petition from a change of plea should also identify the following:

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

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

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

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

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

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

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

(H) the sentence imposed by the court; and

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

A notice filed in a petition from a change of plea must also include or incorporate Form ___, with citations to the pertinent portions of the record.

(3) *No Colorable Claims: Petition from a Trial.* A subpart (d)(1) notice in a petition from a bench or jury trial should also identify the following:

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

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

(C) 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);

(D) any adverse rulings on post-trial motions (e.g., motion for a new trial, motion

to vacate judgment);

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

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

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

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

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

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

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

(L) the sentence imposed by the court;

(M) issues raised by appellate counsel; and

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

(4) *Defendant's Pro Se Petition.* Upon receipt of counsel's notice under subpart (d)(1), the defendant may file a petition on his or her own behalf, and 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.

(5) *Counsel's Duties After Filing a Notice Under Subpart (d)(1).* After counsel files a notice under subpart (d)(1) 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 Rule 32 proceeding.

Sources for additions:

- Third Circuit Court of Appeals Guidelines http://www.ca3.uscourts.gov/sites/ca3/files/ANDERS%20GUIDELINES%203dCir.pdf and Checklist http://www.ca3.uscourts.gov/sites/ca3/files/ANDERS%20CHECKLIST.pdf.

- Fifth Circuit Court of Appeals Guidelines http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/andersguidelines.pdf and Checklist http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/anderschecklist.pdf.
- Texas 13th Court of Appeals Guidelines: http://www.txcourts.gov/13thcoa/practice-before-the-court/anders-guidelines/.
- Texas 14th Court of Appeals Guidelines www.txcourts.gov/media/883046/andersguidelines-revised-post-kelly-.pdf and Checklist http://www.txcourts.gov/media/183744/anders-checklist.pdf.

(e) Attorney-Client Privilege and Confidentiality for the Defendant. [Proposed by David Euchner] Upon the appointment of counsel for a defendant in a post-conviction proceeding, the defendant's prior counsel must share all files and other communications with post-conviction counsel. Neither the attorney-client privilege nor any other claim to privilege or confidentiality is affected by the sharing of information among the defendant's predecessor and successor counsel.

~~(c)~~**(f) 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)~~(g) **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)~~(h) **Stay of Execution of a Death Sentence on a Successive Petition.** Once the defendant has received a sentence of death and the Supreme Court has fixed the time for executing the sentence, the trial court may not grant a stay of execution if the defendant files a successive petition. In those circumstances, the defendant must file an application for a stay with the Supreme Court, and the application must show with particularity any claims that are not precluded under Rule 32.2. If the Supreme Court grants a stay, the Supreme Court clerk must notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

COMMENT

Rule 32.4(a). If a petition is filed while an appeal is pending, the appellate court, under Rule 31.3(b), may stay the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment or sentence. *See* Rule 3 l .4(b) (requiring consolidation unless good cause exists not to do so).

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

(a) Form of Petition. A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.

(b) Length of Petition. In Rule 32 of-right and noncapital cases, the petition must not exceed 28 pages. The State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages. In capital cases, the petition must not exceed 80 pages. The State's response must not exceed 80 pages, and defendant's reply must not exceed 40 pages.

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

(e) Effect of Non-Compliance. The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 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.

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. 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.

(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 32.7. Informal Conference

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

(b) Capital Cases. In a capital case, the court must hold an informal conference no later than 90 days after counsel is appointed on the first notice of a petition for post- conviction relief.

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

Rule 32.8. Evidentiary Hearing

(a) Rights Attendant to the Hearing; Location; Record. The defendant is entitled to a hearing to determine issues of material fact and has the right to be present and to subpoena witnesses for the hearing. The court may order the hearing to be held at the defendant's place of confinement if facilities are available and after giving at least 15 days' notice to the officer in charge of the confinement facility. In superior court proceedings, the court must make a verbatim record.

(b) Evidence. The Arizona Rules of Evidence applicable 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.

~~(e)~~

Rule 32.9. Review

(a) Filing of a Motion for Rehearing.

(1) ***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.

(2) ***Response and Reply.*** An opposing party may not file a response to a motion for rehearing unless the court requests one, but the court may not grant a motion for rehearing without requesting and considering a response. If a response is filed, the moving party may file a reply no later than 10 days after the response is served.

(3) ***Effect on Appellate Rights.*** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under (c).

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

~~(b)~~ **(c) Notification to the Appellate Court.** If an appeal of a defendant's conviction or sentence is pending, the court must send a copy of any of its rulings granting or denying relief on the defendant's notice or petition for post-conviction relief, or any motion for rehearing, to the appellate court within 10 days after the

ruling is filed. Defendant's counsel, or if defendant is self-represented, the defendant, also must file a notice in the appellate court informing that court whether the trial court granted or denied relief.

~~(c)~~(d) Petition and Cross-Petition for Review.

(1) Time and Place for Filing.

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

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

(C) *Place for Filing.* The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.

(D) *Computation of Time and Modifying Deadlines.* Rule 31.3(d) governs the computation of any appellate court deadline in this rule, and an appellate court may modify any deadline in accordance with Rule 31.3(e).

(2) *Notice of filing and Additional Record Designation.* No later than 3 days after a petition or cross-petition for review is filed, the petitioner and cross-petitioner must file with the trail court a "notice of filing." The notice of filing may designate additional items for the record described in (e). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.4(e), or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition for review.

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

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

(A) *Form and Length.* Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(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 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.

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

(i) copies of the trial court's rulings entered under Rules 32.6(d), 32.8(d) and 32.9(b);

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

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

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

(C) *Effect of a Motion for Rehearing.* The filing of a motion for rehearing under

(a) does not limit the issues a party may raise in a petition or cross-petition for review.

(D) *Waiver*. A party's failure to raise any issue that could be raised in the petition or cross-petition for review constitutes a waiver of appellate review of that issue.

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

~~**(A)** *Generally*. Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-~~

~~petition.~~

~~**(B)** *Capital Cases.* In capital cases, the parties must submit an appendix that supports all of the petition's references to the trial court record, with copies of supporting portions of the record.~~

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

(6) Service; Response; Reply.

(A) *Service.* A party filing a petition, cross-petition, appendix, response, reply, or a related filing must serve a copy of the filing on all other parties. The serving party must file a certificate of service complying with Rule l.7(c)(3), identifying who was served and the date and manner of service.

(B) *Response.* 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. 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 (c)(4)(A). An appendix to a response must comply with the form and substantive requirements in (c)(5).

(C) *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 form requirements in (c)(4)(A) and may not include an appendix.

(7) ***Amicus Curiae.*** Rules 3 l. l 3(a)(7) and 31.15 govern filing and responding to an amicus curiae brief.

~~**(d)**~~**(e)** **Stay Pending Review.** The State's filing of a motion for rehearing or 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 or the appellate court.

~~**(e)**~~**(f)** **Transmitting the Record to the Appellate Court.** No later than 45 days after receiving a notice of filing under (c)(2), the trial court clerk must transmit

the record. The record includes copies of the notice of post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, and any exhibits admitted by the trial court in the post-conviction proceedings.

~~**(1)** *In Noncapital Cases.* No later than 45 days after receiving a notice of filing under (c)(2), the trial court clerk must transmit the record, including the trial court file and transcripts filed in the trial court, to the appellate court.~~

~~**(2)** ***In Capital Cases.*** The trial court clerk may transmit the record of post-conviction proceedings to the appellate court only if the appellate court requests it. The record includes copies of the notice of post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, and any exhibits admitted by the trial court in the post-conviction proceedings.~~ [Lacey's suggested edits.]

~~(f)~~(g) **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.

~~(g)~~(h) **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 (f).

~~(h)~~(i) **Return of the Record.** After a petition for review is resolved, the appellate clerk must return the record to the trial court clerk for retention.

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

Rule 32.10. Review of an Intellectual Disability Determination in Capital Cases 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 32.11. Extensions of Time; Victim Notice and Service

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

(b) Manner and Timing of Service or Notice.

(1) *Victim's Choice of the Manner of Service.* The victim may specify in the notice of appearance whether the service of the request should be 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.

(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 32.12. Post-Conviction Deoxyribonucleic Acid Testing

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

(1) in the possession or control of the court or the State;

(2) related to the investigation or prosecution that resulted in the

judgment of conviction; and

(3) that may contain biological evidence.

(b) Manner of Filing; Response. The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 32.4(a)(4). The State must respond to the petition 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) ***Mandatory Testing.*** After considering the petition and the State's response, the court must order DNA testing if the court finds that:

(A) a reasonable probability exists that the defendant would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

(B) the evidence is still in existence; and

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

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

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

(B) DNA testing will produce exculpatory evidence.

(3) ***Laboratory; Costs.*** If the court orders testing under (d)(l) or (2), the court must select an accredited laboratory to conduct the testing. The court may require the defendant to pay the costs of testing.

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

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

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

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

(e) Test Results.

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

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

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

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

(1) notifying the Board of Executive Clemency or a probation department;

(2) requesting to add the defendant's sample to the federal combined DNA index system offender database; or

(3) notifying the victim or the victim's family.

(h) **Favorable Test Results.** Notwithstanding any other provision of law that would bar a hearing as untimely, the court must order a hearing and make any further orders that are required by statute or the Arizona Rules of

Criminal Procedure if the results of the post-conviction DNA testing are favorable to the defendant. If there are no material issues of fact, the hearing need not be an evidentiary hearing, but the court must give the parties an opportunity to argue why the defendant should or should not be entitled to relief under Rule 32.1 as a matter of law.

Form ___, Plea PCR Notice of Compliance Checklist

Provide citations to the record, including the presentence report (PSR), and to relevant authority, where appropriate, in the right hand column to demonstrate compliance by the trial court and/or the parties.

	Guilty or No Contest Plea—Ariz. R. Crim. P. Rule 17.	
I.	**Advising and Questioning the Defendant.** 17.1, 17.2.	
	(a) Defendant was personally present. 17.1(a)(2), (f).	
	(b) Court explained the nature of the charge for the plea. 17.2(a)(1).	
	(c) The Court explained the range of possible sentence 17.2(a)(2). **(1)** Minimum. **(2)** Maximum. **(3)** Fines. **(4)** Special Conditions.	
	(d) The Court explained the constitutional rights waived by entering a plea. 17.2(a)(3); 17.3(a)(1).	
	(e) The Court informed the defendant of the right to plead not guilty. 17.2(a)(4).	
	(f) The court explained the entry of a guilty plea would result in the waiver of the defendant's right to appeal and PCR would be the only available form of review. 17.1(e); 17.2(a)(5).	
	(g) The Court advised the defendant of the immigration consequences of a guilty plea. 17.2(b).	
II.	**Voluntariness of Plea.** The Court determined the plea was voluntary. 17.1(b); 17.3(a); 17.4(c) **(a)** Not the result of threats. **(b)** Not the result of force. **(c)** Not the result of promises.	
III.	**Factual Basis.** 17.3(b).	
IV.	**Acceptance of Plea.** The trial court accepted the plea agreement either at the time of the change of plea, 17.4(d), or at sentencing if deferred, 17.3(b).	
V.	**Written and Signed.** The plea agreement written and signed by the defendant. 17.4(b).	

Sentencing—Ariz. R. Crim. P. Rule 26.		
I.	**Disclosure of Reports.** The PSR, and any other report, was disclosed to the Defendant before sentencing. 26.6(a).	
II.	**Opportunity for Objections.** The Defendant had the opportunity to raise objections to the PSR. 26.8(b).	
III.	**Rulings and Remedies on Objections.** The Court ruled on the Defendant's objections and provided remedies where appropriate (e.g. new PSR, excision, sealing). 26.8(c).	
IV.	**Prosecutorial Compliance.** The prosecutor complied with any promises or guarantees made in the plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971).	
V.	**Pronouncement of Judgement.** 26.10(a).	
VI.	**Pronouncement of Sentence.** 26.10(b). **(a)** The Court gave the Defendant an opportunity to address the Court. 26.10(b)(1) . **(b)** The Court considered Defendant's time in custody. 26.10(b)(2). **(c)** The Court explained the terms of sentence/probation. 26.10(b)(3). **(d)** The Court specified the commencement date. 26.10(b)(4).	
VII.	**Reasons for Sentence.** The Court set forth its reasons for the sentence. A.R.S. § 13-701(C).	
VIII.	**Enforcement of Plea.** The Court sentenced the defendant pursuant to the plea agreement. 17.4(d), (e), (g).	

Based on Federal Checklists:
Third Circuit: http://www.ca3.uscourts.gov/sites/ca3/files/ANDERS%20CHECKLIST.pdf
Fifth Circuit: http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/anderschecklist.pdf

Comparison of Forms to Rule 32

Per our last meeting, we compared Rule 32 to the applicable forms (24(b), 25, and 26) looking for discrepancies between the forms and the rules. We found none. In fact, the rules don't provide any real insight as to required content. Instead, the rules indicate the parties should refer to the rules.

For Content of the Notice, the rule provides:

> 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).

Ariz.R.Crim.P. 32.4(a)(3).

For the Request for Transcripts, the Rules don't provide for any specific content. The rule simply says a form has to be available:

> 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.

Ariz.R.Crim.P. 32.4(e)(1).

The Rule regarding Form of Petition follows the model of Content of the Notice and refers the party to the form:

> 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.

Ariz.R.Crim.P. 32.5(a).

However, there was perhaps one small issue with the Notice form. The form in section (5)(B) asks, "Is Defendant raising a claim of ineffective assistance of counsel? YES [ ] or NO [ ]." The concern raised during our meeting was with the Notice requiring an identification of issues. IAC seems to be the only issue the form asks the defendant to identify beforehand. This may, however, be used by the Courts for screening purposes.

Proposed changes to Forms

Form 24(b)

There is one more small change we could make to the Notice form in subsection (6) regarding an Untimely Notice or Previous Rule 32 Case. Here, everyone seemed to agree the defendant should be required to indicate the ground for relief so we could quickly ensure the claim is being raised under Rule 32.1(d)-(h). Here's how the section reads:

> · Is a claim pursuant to Rule 32.1(d), (e), (f), (g), or (h) being raised in this petition?
> **YES** [ ] or **NO** [ ]
>
> If YES, place a check mark in the appropriate box:
>
> [ ] The defendant is being **held in custody** after the sentence imposed has been expired.
>
> [ ] Newly discovered **material facts** exist which probably would have changed the verdict or sentence.
>
> [ ] The defendant's failure to file **timely notice** of post-conviction relief or notice of appeal was without fault on the defendant's part.
>
> [ ] There has been a **significant change** in the law that would probably overturn the conviction or sentence.
>
> [ ] Facts exist which establish by clear and convincing evidence that the defendant is **actually innocent**.
>
> · **STATE THE FACTS** that support the claim and the reasons for not raising the claim in the previous petition or in a timely manner.
> [Space provided]

However, the indication that the claim must be pursuant to the listed subsections does not necessarily link to the boxes that follow. This could be easily resolved by placing the pertinent citation at the end of each of the sentences explaining the box:

> · Is a claim pursuant to Rule 32.1(d), (e), (f), (g), or (h) being raised in this petition?
> **YES** [ ] or **NO** [ ]
>
> If YES, place a check mark in the appropriate box:
>
> [ ] The defendant is being **held in custody** after the sentence imposed has been expired. Rule 32.1(d).
>
> [ ] Newly discovered **material facts** exist which probably would have changed the verdict or sentence. Rule 32.1(e).
>
> [ ] The defendant's failure to file **timely notice** of post-conviction relief or notice of appeal was without fault on the defendant's part. Rule 32.1(f).

[ ] There has been a **significant change** in the law that would probably overturn the conviction or sentence. Rule 32.1(g).

[ ] Facts exist which establish by clear and convincing evidence that the defendant is **actually innocent**. Rule 32.1(h).

This makes no substantive changes but makes it clear to the defendant (or attorney relying on the form) that the list represents the possible justifications for raising an untimely petition.

Form 26

There one more small nitpicky thought on the Petition for Post-Conviction Relief form. The second Reason for Requested Relief is: "The introduction at trial of evidence obtained by an unconstitutional search and seizure." This should actually be phrased either in the disjunctive ("search or seizure") or alternative ("search and/or seizure") rather than the conjunctive ("search and seizure"). Very often the two are interrelated, but there is no harm in including the term "or" to clarify that either an unconstitutional search or an unconstitutional seizure is a reason to request relief. This change brings the form more in line with common practice anyhow as lawyers likely feel free to argue unconstitutional search or unconstitutional seizure independently.

Form 25

One final thing, there is a small discrepancy in the form accessed on the self-service center on the Courts website: http://www.azcourts.gov/selfservicecenter/Self-Service-Forms/Criminal-Forms. The Form available on the website reads, "The defendant has filed a Petition for Post-Conviction Relief in the above-entitled cause." The form should read (and reads in the statute books) that the defendant has filed a Notice. We just need to update the form on the Courts website (as well as Maricopa County http://www.superiorcourt.maricopa.gov/sscdocs/packets/crpcr1z.pdf).

From: Hallam, Donna
Sent: Wednesday, May 23, 2018 12:19 PM
To: Meltzer, Mark
Cc: Cattani, Kent
Subject: Rule 32.1(g)

Hello Mark –

I have a question for the Rule 32 committee regarding the 2018 amendment to Rule 32.1(g). I am also copying Judge Cattani. Perhaps you could inquire whether any committee member thinks this is worth discussing. Thanks.

The amended Rule 32.1(g) provides for relief where "There has been a significant change in the law that, **if applied** to the defendant's case, would probably overturn the defendant's conviction or sentence."

The rule does not say "if it applies to" or "if applicable to" the defendant's case. **Has the amendment inadvertently deleted the retroactivity requirement?** Could a petitioner reasonably make that argument?

The prior Rule 32.1(g) and the PCR statute provide for relief where "There has been a significant change in the law that **if determined to apply to** the defendant's case would probably overturn the defendant's conviction or sentence."

State v. Slemmer, 170 Ariz. 174, 179, 823 P.2d 41, 46 (1991) ("The standards governing post-conviction relief are provided in Rule 32, which generally precludes relief on grounds that were or could have been raised and adjudicated on appeal. However, there is no preclusion when "[t]here has been a significant change in the law applied in the process which led to the petitioner's conviction or sentence, and there are sufficient reasons to allow retroactive application of the changed legal standard." Rule 32.1(g). Thus, we determine preclusion under Rule 32 on the basis of our retroactivity analysis. We turn, therefore, to that question.").

Donna Hallam
Staff Attorney
Arizona Supreme Court

From: Meltzer, Mark
Sent: Wednesday, May 23, 2018 12:50 PM
To: Hallam, Donna
Cc: Cattani, Kent ; David Euchner
Subject: RE: Rule 32.1(g)

Donna,

I don't believe the Criminal Rules Task Force intended a substantive change in its revision, but I'll defer to CRTF members, several of whom are on the Rule 32 TF.

Because the issue you raised generally falls under “preclusion,” I’m copying the Workgroup 1 leader, David Euchner, on this email. Workgroup 1 was assigned the topic of preclusion, and David was also on the CRTF.

Thanks,

Mark

From: David Euchner
Sent: Wednesday, May 23, 2018 1:05 PM
To: Meltzer, Mark; Hallam, Donna
Cc: Cattani, Kent
Subject: RE: Rule 32.1(g)

Thanks for looping me in Mark.

Donna – Slemmer is old enough, and Rule 32 underwent a significant overhaul in 1992, and I’m not at the office right now with access to all my old books so I can’t say when the language of the rule changed… but I can say that the 2017 version of Rule 32.1(g) did not include any retroactivity language. See State v. Valencia, 241 Ariz. 206, 208 paragraph 9 (2016). To the extent retroactivity analysis is required, it is implied by the phrase “if applied to the defendant’s case.”

Our changes to Rule 32.1 were purely stylistic. In fact, we specifically avoided making certain stylistic changes because of how much Rule 32 litigation is driven by extant case law, and that’s what inspired us to ask the Chief Justice to create the Rule 32 Task Force.

Cheers,
Dave

Arizona Revised Statutes Annotated
Title 13. Criminal Code (Refs & Annos)
Chapter 38. Miscellaneous
Article 29. Post-Conviction Relief (Refs & Annos)

A.R.S. § 13-4231

§ 13-4231. Scope of post-conviction relief

Currentness

Subject to the limitations of § 13-4232, any person who has been convicted of or sentenced for a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief on any of the following grounds:

1. The conviction or the sentence was in violation of the Constitution of the United States or of this state.

2. The court was without jurisdiction to render judgment or to impose sentence.

3. The sentence imposed exceeded the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law.

4. The person is being held in custody after his sentence has expired.

5. Newly discovered material facts probably exist and that the facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:

(a) The newly discovered material facts were discovered after the trial.

(b) The defendant exercised due diligence in securing the newly discovered material facts.

(c) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

6. The defendant's failure to appeal from the judgment or sentence, or both, within the prescribed time was without fault on his part.

7. There has been a significant change in the law that if determined to apply to the defendant's case would probably overturn the defendant's conviction or sentence.

Credits

Added by Laws 1984, Ch. 303, § 1. Amended by Laws 1992, Ch. 358, § 1.

Notes of Decisions (3)

A. R. S. § 13-4231, AZ ST § 13-4231

Current through the First Special Session of the Fifty-Third Legislature (2018), and through legislation effective May 16, 2018 of the Second Regular Session of the Fifty-Third Legislature (2018)

End of Document

Memo
To: Rule 32 Committee, Arizona State Supreme Court
From: David Euchner, Beth Capin Beckmann, Dan Levey
RE: Attorney Client Privilege and Ineffective Assistance of Counsel
Date: July 6, 2018

Throughout the United States (see attached appendices), when a defendant files a Post Conviction petition for Ineffective Assistance of Counsel (IAC) claim it is generally the law that there is an implied waiver of the attorney-client privilege.

The American Bar Association (ABA), in Formal Opinion 10-456,[1] discussed the issues of attorney-client privilege and confidentiality in the context of IAC claims. The ABA noted that while an IAC claim normally waives the attorney-client privilege with regard to some otherwise privileged information, this privileged information is still protected by Model Rule 1.6(a) unless the defendant gives **informed consent** to its disclosure or an exception to the confidentiality rule applies. Formal Opinion 10-456, 1.

The Ninth Circuit Court of Appeals has held that under the doctrine of implied waiver the court gives the holder of a privilege the choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it. *Bittaker v. Woodford*, 331 F.3d 715, 720 (9th Cir. 2003). The Ninth Circuit explained that under this framework, the court should impose a waiver no broader than needed to ensure the fairness of the proceedings before it. *Id.* The holder of the privilege may preserve the confidentiality of privileged communications by choosing to abandon the claim giving rise to the waiver condition. *Id.* at 721. A party waiving privilege is entitled to rely on the contours of the waiver the court imposes, so that it will not be unfairly surprised in the future by learning that it actually waived more than it bargained for in pressing its claims. *Id.* The 10th Circuit Court of Appeals reasoned that "given the ample, unanimous federal authority on point, we hold that when a habeas petitioner claims ineffective assistance of counsel, he impliedly waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim." *United States v. Pinson*, 584 F.3d 972 (10th Cir. 2009).

In Arizona, an IAC claim is "a direct attack on the competence of an attorney and constitutes a waiver of attorney-client privilege." *State v. Moreno*, 128 Ariz. 257, 625 P.2d 320 (1981). Under a direct IAC claim, an attorney should be allowed to defend himself, at least with regard to the particular contentions asserted, by revealing "at least that much of what was previously privileged as is necessary...." *Id.* at 260, 625 P.2d at 323; *State v. Zuck*, 134 Ariz. 509, 515, 658 P.2d 162, 168 (1982). Also, in *State v. Cuffle* 171 Ariz. 49 (1992) 828 P.2d 773 the Arizona Supreme Court ruled specifically "that the defendant waived his Attorney-client privilege by arguing ineffective assistance of counsel in federal court." In *Waitkus v. Mauet*,157 Ariz. 339 (1988) 757 P.2d 615 the Arizona Court of Appeals held that "defendant's attack on trial counsel's competency waived

[1] Available at https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/ethics_opinion_10_456.authcheckdam.pdf

attorney-client privilege as to contentions asserted but did not warrant disclosure of trial counsel's files to the state.

Across the country, case law seems to establish that defendants knowingly, voluntarily, and intelligently waives the privilege when filing a IAC claim. In Arizona, defense lawyers disagree on whether the preceding counsel can just turn over all files and share client communication with the successor unless and until successor counsel obtains a waiver.

The Arizona cases do not address the concerns that are reviewed by the Ninth Circuit in *Bittaker* and in the ABA opinion. We find it not only concerning but also disturbing that a defendant in Arizona can have his attorney-client privilege waived impliedly without necessarily being advised of the ramifications of raising claims against predecessor counsel. It has been observed in court by some that not only trial judges and prosecutors but defense lawyers often have a cavalier attitude toward the issue.

We believe that defense lawyers and defendants can benefit from inclusion of language in Rule 32.4 that says the filing of a notice waives privilege and confidentiality issues of preceding counsel only as to successor counsel and that an express waiver should be given to the defendant. We think that Rule 32 petitioners cannot use the attorney-client privilege as both a shield and a sword. We see no harm in requiring an express waiver, either in writing or orally in court after a colloquy with the judge before proceeding with the attorney giving evidence. Accordingly, we suggest the following additions to Rule 32.4 and 32.6, respectively.

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

(a)-(e) – No Change

(f) Attorney-Client Privilege and Confidentiality for the Defendant. Upon the appointment of counsel for a defendant in a post-conviction proceeding, the defendant's prior counsel must share all files and other communications with post-conviction counsel. Neither the attorney-client privilege nor any other claim to privilege or confidentiality is affected by the sharing of information among the defendant's predecessor and successor counsel.

(~~f~~g) 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~~h) 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.

(1)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. 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.

(2) If responding to the petition requires inquiry into material or information covered by any privilege, the State may move the court for an order that any of defendant's counsel disclose any material relevant to a fair determination of claims in the petition.

(a) Prior to granting such an order, the court must hold a hearing and obtain from the defendant a knowing, intelligent, and voluntary waiver of the attorney-client privilege. In obtaining such waiver, the court must advise the defendant that a failure to waive the privilege will result in dismissal of any claims in the petition that are dependent on privileged material or information.

(b) Any order granted under this rule must be strictly limited to material or information necessary to respond to the claims in defendant's petition, in accordance with Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

(c) Any disclosure of privileged material or information must be made through the defendant's counsel, or if proceeding without counsel, the defendant. If the State requires an interview with prior counsel or any other witness covered by privilege, such interview must be in the presence of defendant's counsel, or if proceeding without counsel, the defendant.

(d) If the defendant refuses to waive a privilege and such refusal prevents the State from effectively responding to the defendant's claims, then the court must dismiss any claims for which privileged material or information is necessary to resolve.

(b)-(d) – No Change

ABA Death Penalty Representation Project
740 Fifteenth Street, N.W.
Washington, D.C. 20005
Email: deathpenaltyproject@staff.abanet.org
Phone: 202.662.1738

Staff Members
Robin M. Maher, Director
Emily M. Williams, Staff Attorney
Rebecca Katz, Project Associate

MEMORANDUM

To: Amy Armstrong, Director, Arizona Capital Representation Project

From: Robin M. Maher, Director, American Bar Association Death Penalty Representation Project

Date: December 9, 2010

Re: *Whether the ABA Guidelines require two attorneys to be appointed to the defense team during state post-conviction representation?*

Thank you for contacting the American Bar Association Death Penalty Representation Project for an opinion regarding the applicability of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. 2003) in state post conviction proceedings. This memo will provide you with the detail and rationale for the position that two attorneys are required to be appointed to the defense team in state post-conviction proceedings.

****

A. The Revised Edition of the ABA Guidelines: Background.

In 2003, the American Bar Association published its *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003).* I led the project that reviewed and analyzed the prior 1989 version of the Guidelines, which by 2003 were out of date and not reflective of important changes in death penalty jurisprudence (notably, the Anti-Terrorism and Effective Death Penalty Act). I assembled an advisory committee, comprised of experienced capital defenders, academics, and representatives from Sections of the ABA, to discuss necessary revisions and/or additions to the prior version. Along with the Reporter, I incorporated the decisions of the advisory committee into the revised version. A Commentary provided the background and

rationale for each Guideline. I then met with many ABA Members, Sections, and Committees over several months to discuss the changes and recommendations and to obtain co-sponsorship and approval. The revised version of the ABA Guidelines was presented to the House of Delegates in February 2003. It was overwhelmingly adopted without dissent.

Since their publication, the ABA Guidelines have been repeatedly cited by state and federal courts, including the United States Supreme Court, as the most authoritative articulation of the responsibilities of death penalty jurisdictions and defense counsel. They have been adopted by numerous jurisdictions, organizations, courts, and bar associations. The American Bar Association believes that meeting the responsibilities identified in the ABA Guidelines is essential to ensuring justice in capital cases.

B. The ABA Guidelines Apply to State Post-Conviction Proceedings.

Guideline 1.1 provides:

> These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, *post-conviction review*, clemency proceedings and any connected litigation.

ABA Guidelines 1.1(B) (*emphasis added*). Definitional Note 5 explains that, "[i]f a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or commentary will so state." Guideline 1.1, Definitional Note 5.

C. The Defense Team is Critical to the Delivery of High Quality Legal Representation in Post-Conviction Proceedings.

The objective of the Guidelines is to "ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." Guideline 1.1 (A). In furtherance of that objective, the ABA Guidelines (and many other national standards) describe a "team" approach that will ensure the necessary expertise is available for the defense effort. The ABA Guidelines therefore require the appointment of a qualified defense team that has the resources "necessary or appropriate to provide high quality legal representation at every stage of the proceedings." Guideline 4.1(B).

Guideline 4.1 – The Defense Team and Supporting Services

A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.

2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

B. The Legal Representation Plan should provide for counsel to receive all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation **at every stage of the proceedings.** The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

1. Counsel should have the right to have such services provided by persons independent of the government.

2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

Guideline 4.1 (*emphasis added*).

The same skills and resources of the defense team at trial are required in post-conviction proceedings. As the Commentary explains:

> Ensuring high quality legal representation in capital trials ... does not diminish the need for equally effective representation ... in state post-conviction proceedings.... [B]ecause of the general tendency of evidence to emerge only at the relatively late stage in capital proceedings, jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines... at all stages of the case.

Guideline 1.1, Commentary.

If you have any questions, please do not hesitate to contact me. Thank you.

Rule 10.2. Change of Judge as a Matter of Right

(a) Entitlement.

(1) *Generally.* Each side in a criminal case is entitled to one change of judge as a matter of right. If two or more parties on a side have adverse or hostile interests, the presiding judge or that judge's designee may allow additional changes of judge as a matter of right.

(2) *Meaning of "Side."* Each case, including one that is consolidated, is treated as having only two sides.

(3) *Per Party Limit.* A party exercising a change of judge as a matter of right is not entitled to another change of judge as a matter of right.

~~(4) *Inapplicability to Certain Proceedings.* A party is not entitled to a change of judge as a matter of right in a proceeding under Rule 32 or a remand for resentencing.~~

(e) Waiver. A party loses the right to a change of judge under this rule if the party participates before that judge in any contested matter in the case, a proceeding under Rule 17, ~~or~~ the beginning of trial, or sentencing.

(f) Following Remand. Unless previously exercised, a party may exercise a change of judge as a matter of right following an appellate court's remand for new trial, and no event connected with the first trial constitutes a waiver. A party may not exercise a change of judge as a matter of right following a remand for resentencing. [no change]

Committee Comment to 2020 Amendment [Note: Is this comment necessary?]

The 2020 amendment to Rule 10.2 deleted Rule 10.2(a)(4) that stated, "a party is not entitled to a change of judge as a matter of right in a proceeding under Rule 32 or a remand for resentencing."

Rule 32. Rule 32.3 states that a post-conviction proceeding is part of the original criminal action and is not a separate action. The Committee intended that the deletion of language in Rule 10.2(a)(4) regarding Rule 32 would help distinguish post-conviction proceedings before the original judge, where the waiver provisions of Rule 10.2(e) apply, and post-conviction proceedings where a new judge is assigned because the original judge is unavailable. In the latter circumstance, either party now may exercise a change of judge as a matter of right in the Rule 32 proceeding in the same manner as before trial. The waiver

provisions of Rule 10.2(e) now also include "sentencing" to emphasize that a party may not exercise a change of judge in Rule 32 proceedings against the sentencing judge.

Remands for Resentencing. The 2018 restyling of the Arizona Rules of Criminal Procedure included new language in Rule 10.2(f) that a change of judge as a matter of right was not available on a remand for resentencing. Deleted language in Rule 10.2(a)(4) regarding a remand for resentencing was therefore duplicative and unnecessary.