

Rule 32 Task Force

Meeting Agenda

Friday, August 31, 2018

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

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

Item no. 1	Call to Order Introductory remarks	<i>Hon. Joseph Welty, Chair</i>
Item no. 2	Approval of August 3, 2018 meeting minutes	<i>Judge Welty</i>
Item no. 3	Workgroup reports and discussion of proposed revisions Workgroup 1: <ul style="list-style-type: none">- Preclusion- Discovery- <i>Diaz</i> and <i>Goldin</i> issues- Privilege and confidentiality waivers- Subject matter jurisdiction- Illegal sentences and preclusion Workgroup 2: <ul style="list-style-type: none">- Rule 32.1(h) Workgroup 3: <ul style="list-style-type: none">- Competence- Rule 32.1 redrafting “of right” language- Notice of change of judge (10.2)	<i>All</i> <i>Mr. Euchner, Judge Myers, Judge Eckerstrom Mr. Mitchell, Mr. Levey</i> <i>Judge Cattani, Ms. Gard. Ms. Garcia, Ms. Merrill, Ms. Hoecker</i> <i>Judge Johnson, Judge Beene</i>
Item no. 4	Roadmap	<i>Judge Welty</i>
Item no. 5	Call to the Public Adjourn	<i>Judge Welty</i>

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: August 3, 2018

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

Absent: Timothy Agan

Guests: Donna Hallam, George Papa, John P. Todd, Tim Geiger, Kathryn Andrews

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

1. **Call to order; introductory remarks; approval of meeting minutes.** The Chair called the second Task Force meeting to order at 10:05 a.m. He introduced the proxies and thanked members for their efforts during workgroup sessions.

After the first Task Force meeting, the Chair designated 18 issues for the workgroups to study. However, the Chair emphasized that this was only an initial compilation of issues. He requested members to bring to his or staff's attention any additional issues they find regarding Rule 32, and he will assign each of those new issues to one of the workgroups. The Chair reminded members to use the SharePoint version of Rule 32 when they prepare revisions for presentation to the Task Force. This will facilitate document sharing and version control. He observed that Administrative Order No. 2018-07, which established this Task Force, sets December 31, 2019 as the termination date for the members' terms. This will allow members to meet throughout 2019 to consider comments to their rule petition, which will be filed with the Supreme Court in January 2019.

The Chair then asked members to review draft minutes of the March 23, 2018 Task Force meeting. There were no corrections to the draft and a member made the following motion:

Motion: To approve the March 23, 2018 meeting minutes. The motion received a second and carried unanimously. **R32TF-001**

The Chair advised that the Task Force would start its review today beginning at Rule 32.1, and then proceed through the rules sequentially.

2. **Rule 32.1.**

Of-right terminology. Judge Johnson opened the discussion by noting Workgroup 3 questioned the clarity of the term "of right petition" and discussed whether to abandon that

terminology. Members thought “of right” was misleading, or at least uninformative, and that “pleading defendant” and “non-pleading defendant” were awkward terms. However, members concurred that even though the term “of right” was misleading, it is imbedded in Arizona case law, and it provides a shorthand way of referring to an initial post-conviction petition by a defendant who pled guilty. Moreover, neither the workgroup nor Task Force members could devise a better term than “of right.” The Chair requested members to research what terms other states are using and determine by the next meeting whether there is a better alternative.

Rule 32.1(f). Members then discussed issues under Rule 32.1(f). Workgroup 3 stylistically preferred “failure to timely file a notice” to the current “failure to file a notice within the required time.” This led to a broader discussion about whether it was necessary to include the words “of right” in Rule 32.1(f), as the workgroup initially proposed, or whether the principles of Rule 32.1(f) could be restated without using that term. Ms. Beckmann suggested that members revise Rule 32.1(f) to provide relief to any defendant filing a successive petition when the failure to timely file the petition was not the defendant’s fault. Some members expressed concern that incarcerated defendants may not get timely notice of court deadlines, for example, when appellate counsel fails to timely notify a client that an appeal was concluded and the time to file a PCR petition had begun to run, or when an inmate had been transferred within the Department of Corrections and legal mail had not yet been forward to the new location.

A judge member observed that the essence of Rule 32.1(f) is the failure to meet a deadline, and a revised rule should express this succinctly. Members reviewed Rule 32.4(a)(2) (“notice of post-conviction relief”) and they agreed to bifurcate the content of Rule 32.1(f). As revised, Rule 32.1(f) would provide relief only for an untimely notice of appeal, i.e., “the failure to timely file a notice of appeal was not the defendant’s fault.” Members coupled that revision with a new subpart 32.4(a)(2)(E) regarding an untimely PCR notice: “*Excusing an Untimely Notice*. The court may excuse an untimely notice of post-conviction relief if the failure to timely file a notice was not the defendant’s fault.” Members agreed that Rule 32.4 was a more appropriate location and that a self-represented defendant would more likely look in Rule 32.4 than in Rule 32.1(f) for a provision excusing an untimely PCR notice. Members concurred with these changes and with the deletion of the comment to Rule 32.1(f). One member noted that these changes will require revisions to Rule 32 forms, which the Task Force should address in the future.

Rule 32.1(g). A Supreme Court staff attorney asked whether the Criminal Rules Task Force’s recent restyling of Rule 32.1(g) intended to make changes in the law automatically retroactive. Members of the Rule 32 Task Force who had also served on the Criminal Rules Task Force confirmed that the previous Task Force did not intend automatic retroactivity. But to clarify this intent, members agreed to change the phrasing of Rule 32.1(g) from “if applied” to “if applicable.”

Rule 32.1(h). Judge Cattani and Ms. Gard proceeded to a discussion of Rule 32.1(h), and a clause in that rule that affords relief upon clear and convincing evidence that no reasonable fact-finder would have imposed the death penalty. They noted the Supreme Court’s recently issued its opinion in *State v. Miles*, 243 Ariz. 511 (April 10, 2018). The primary issue on appeal was, “Can newly proffered mitigation ever constitute clear and convincing evidence under Rule 32.1(h) that

a sentencer would not have imposed the death penalty?” Footnote 6 of a concurring opinion noted the establishment of this Task Force on Rule 32 and said that “Rule 32.1(h) is a prime candidate for the Task Force’s consideration.”

Rule 32.1 has a corollary in A.R.S. § 13-4231, which defines the scope of post-conviction relief. The provision at issue in Rule 32.1(h) is not one of the specified statutory grounds, and Judge Cattani and Ms. Gard addressed the separation of powers issue. Beyond that, and as detailed in a memo Ms. Gard prepared, they discussed whether the current rule’s standard – that the fact-finder would not have imposed the death penalty – is a vague standard that seems to require the PCR judge to get inside the mind of the original jury or judge, which they believe is a subjective and difficult, if not impossible, task. For these reasons, Ms. Gard proposed a two-pronged revision to section (h). Because the aggravation phase of a capital case relies on objective evidentiary findings, one prong would add to section (h) the phrase “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 other prong would delete the words, “the death penalty would not have been imposed,” which would remove death verdicts from the purview of section (h). During her presentation, Ms. Gard noted that she had reviewed the Court’s rule petition files concerning Rule 32.1(h), and the files provided no indication about the origin of the penalty clause provision. She added that if her proposed revisions are adopted, capital defendants would still have avenues for relief on other grounds, such as newly discovered evidence or ineffective assistance of counsel. The Chair opened Ms. Gard’s proposal for discussion.

Ms. Merrill commented that the proposed revisions did not just clarify the rule, as *Miles* requested, but substantively changed it, which she thought was unnecessary. She would rather see a revision that clarifies whether the standard for relief under Rule 32.1(h) is objective or subjective. She also observed that there have been few petitions requesting relief under Rule 32.1(h), and she did not anticipate a flood of new petitions seeking relief under that rule because of *Miles*. Ms. Skinner noted that *Miles* was an exceptional circumstance because that defendant did not have competent counsel until a late stage of his case, and Rule 32.1(h) became a useful avenue for seeking relief. Judge Eckerstrom commented that 20 or 30 years ago, the concept of mitigation was just evolving. It has become more developed over time, there are even ABA standards on the duties of defense counsel regarding mitigation, and now most mitigation is brought up, unlike *Miles*, at earlier stages of a capital case. He acknowledged, however, that powerful mitigation evidence occasionally arises later.

On the other hand, Judge Cattani responded that if a defendant such as *Miles* is going to obtain relief for newly discovered mitigation evidence, it should be on grounds of newly discovered evidence under Rule 32.1(e) or ineffective assistance of counsel, which falls under Rule 32.1(a). Judge Cattani also suggested that Task Force members consider victims’ rights and finality, and not perpetuate a rule, Rule 32.1(h), on which there can be no preclusion. Another member commented on Ms. Gard’s proposed revisions being substantive in nature by noting that the Court could appropriately adopt a procedural rule such as 32.1(h) that allows courts to preclude unwarranted executions. Members further discussed potential issues concerning separation of powers. Judge Eckerstrom commented that there are some hybrid areas that permit

involvement by two branches of government without disregarding separation of powers, and this might be one such area.

The Chair concluded the discussion of Rule 32.1(h) by inviting a memo from Ms. Merrill or from other Task Force members on what an appropriate standard should be under this provision along the lines of what was suggested by a concurring opinion in *Miles*. The Task Force could then decide whether to clarify the standard in the existing rule, or whether to rewrite the rule, as Ms. Gard proposed. He added that the Task Force's rule petition might submit both alternatives to the Court.

3. **Rule 32.3.**

Petitioner's competence. Judge Johnson advised that after considering *Fitzgerald v. Myers*, 243 Ariz. 84, (2017), her workgroup decided it would be appropriate to add a comment to Rule 32.3 that cited to that case. The comment would provide the trial court with guidance on addressing a defendant's competence during a post-conviction proceeding. Her workgroup declined, however, to make a substantive amendment to the body of the rule.

A member asked if the workgroup considered an amendment to Rule 11 ("incompetence and mental examinations") that would include a specific reference to post-conviction proceedings. Judge Johnson responded that it had, but it did not propose an amendment to that rule because that rule deals with trial proceedings. Members also discussed locating a provision concerning a petitioner's competence in Rules 32.4 or 32.5. One member favored a new rule to address the defendant's competence in a Rule 32 proceeding, rather than a comment, because the defendant cannot obtain a remedy based on language in a comment. A judge member noted that he sees a meaningful number of successive petitions by petitioners who appear to have mental health problems but added that some mental health claims might be precluded. Another judge member responded that incompetence might be a ground for not filing a timely notice. The Chair observed that *Fitzgerald* suggests it is possible to have a competence determination in a post-conviction proceeding, and if that's the case, there should be a rule that addresses this. If there's nothing in the rules, the inference is that competence cannot be addressed in a post-conviction proceeding. The Chair also observed that the comment proposed by Judge Johnson's workgroup does not relate to a rule provision; rather, it's a comment untethered to a rule. He proposed that text in a rule should fill this gap.

Members also discussed what would happen in a Rule 32 proceeding if a defendant was found incompetent. Members concurred that if the defendant was restorable, nothing would happen in the proceeding for a specified time pending the defendant's restoration. If a defendant was not restorable, the defendant could not meet the burden of proof and the petition would be denied. One member proposed a fixed time for a stay, possibly 12 or 21 months, if a defendant is found incompetent. Another member suggested that the trial court could proceed on issues raised by a Rule 32 petition that don't require defendant to be competent. However, if a rule includes these options, care should be taken to assure that unresolved issues are not subject to preclusion.

The Chair proposed the following alternatives: include a “mini-version” of Rule 11 within Rule 32; include a reference to Rule 11 in a Rule 32 provision; include guidance in a Rule 32 comment; or make no changes. On a straw poll, 8 of 14 members opposed the option of adding a rule provision. The workgroup’s comment was a compromise for those who did not want to put the substance of a competence determination in Rule 32 but still wanted to provide some guidance for trial judges. On another straw vote, 11 of 16 members opposed adding a comment. The Chair reminded members that they can ask for reconsideration if they have another proposal for addressing *Fitzgerald*.

4. Rule 32.4.

Whitman issue. Workgroup 2 dealt with an issuing arising under *State v Whitman*, 234 Ariz. 565 (2014). It did this by changing the words “entry of judgment and sentence” in current Rule 32.4(a)(2) to “oral pronouncement of sentence.” Members concurred with this revision.

Notice to the appellate court. Ms. Beckmann noted that issues have arisen when there are concurrent appeals and Rule 32 proceedings in the trial court. She proposed an amendment to Rule 32.4(a)(4)(B) that would require the superior court clerk to send a copy of a final ruling in the PCR proceeding to the appropriate appellate court, as provided in Rule 32.9(c). Members concurred with her proposed amendment.

Appointment of co-counsel. Rule 32.4(b) addresses the appointment of counsel in capital post-conviction proceedings. Workgroup 3 reviewed American Bar Association materials and then discussed whether clarification of this rule was necessary to address the appointment of co-counsel. It determined that it was, but the workgroup also agreed that appointment of co-counsel should be discretionary rather than mandatory. It therefore proposed adding the following new sentence at the end of Rule 32.4(b)(1): “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.” The proposed amendment would reflect current trial court practices. Members then discussed whether the appointment of co-counsel should be mandatory in a PCR proceeding (as indicated in the ABA materials), the burden of establishing a need for the request (it is a low burden), the timing of making the request (it should be in the early stage of a PCR), and the qualifications of PCR co-counsel (which are not addressed in Rule 6.8). Members preferred that the rule permit first chair counsel, rather than the court, to select co-counsel, because there may be issues in a case that require co-counsel with specialized knowledge, even if co-counsel is not qualified as trial counsel under Rule 6.8.

Smaller counties might not be able to afford a full defense team on a PCR, and by using the word “may” in Rule 32.4(b), the court could consider the county’s financial resources before making appointments. On the other hand, if the defendant makes a showing that appointment of co-counsel is “reasonably necessary,” the court might be required to make the appointment. Members resolved this dilemma by moving the workgroup’s proposed language into a new subpart 32(b)(3), which would make the provision concerning the appointment of investigators, expert witnesses, and mitigation specialists applicable in both capital and non-capital cases. With

revisions, new subpart 32(b)(3) provides, “*Investigators, Expert Witnesses, and Mitigation Specialists*. On application and if the trial court finds that such assistance is reasonably necessary, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7 at county expense.” But upon a showing of reasonable necessity in a capital case, the court must appoint co-counsel under revised subpart 32(b)(1). Members agreed with these changes.

Anders-type review. Mr. Steinfeld presented an extensively revised Rule 32.4(d) to address the duties of defense counsel when they review post-conviction matters and find no colorable claims. His proposal includes a new form (not yet numbered) titled “Plea PCR Notice of Compliance Checklist.” Mr. Steinfeld’s proposed form and rule revisions represent his amalgamation of lists utilized in several federal circuits. Judge Cattani, who leads this workgroup, added that the proposed rule amendments and form were unanimously supported by the workgroup. Judge Cattani also mentioned that the Arizona Supreme Court did not accept a petition for review in *State v. Chavez*, which contains his special concurring opinion about the desirability of *Anders*-type review in post-conviction proceedings; Judge Cattani regards this declination as recognition that courts have no obligation to do an *Anders*-type review.

On the other hand, a defense attorney member interpreted the denial of review in *Chavez* as a signal to this Task Force to propose a rule amendment that addresses this topic. The member reported a variety of misfeasance of counsel on PCR appointments, such as not reading the file or filing inaccurate certifications. The member believes a better approach is not to require the court to do an *Anders*-type review, but rather, to fashion the rule so that counsel is required to perform the basic duties of a PCR investigation. Mr. Steinfeld noted that his proposed amendments and form outline those duties in a simple yet comprehensive manner. The proposed form would help assure that counsel has in fact looked at the court’s record and corresponds with what an appellate court does on an *Anders* review. Members’ comments followed.

One member asked what action the court should take if counsel submits an incomplete form. Members postulated that an attorney could indicate that some portions of the form were “n/a [not applicable],” or the court could return the matter to counsel to complete the form. Ms. Beckmann asked whether the workgroup intends the form to be used on successive petitions. The Chair noted that a variety of issues won’t be apparent on the record or reported on the form, such as what impelled the defendant to accept a plea offer. Judge Eckerstrom asked whether the form should be limited to of-right petitions, because an of-right petition is more analogous to a direct appeal. He suggested that it would not be feasible to impose an *Anders* review on trial judges in every post-conviction proceeding. He added that he did not believe Mr. Steinfeld’s checklist was burdensome. Mr. Steinfeld responded to these comments by saying that the form is designed for the initial of-right petition. Neither the proposed rule nor the form prescribes what action counsel must take after reviewing the record; rather, they are designed simply to assure that counsel has reviewed the record. Counsel would not need to complete the form if counsel found a colorable issue and raising a single colorable issue might be less work than completing the form. A judge member also raised an issue concerning a provision in the proposed rule that requires counsel to identify potential claims. Mr. Steinfeld responded that he used the word “potential” for claims that counsel declined to raise because the trial court probably made the correct ruling. Mr.

Steinfeld explained that he wanted the form to be inclusive without causing friction between counsel and the defendant.

In summary, only one Task Force member believed that the court should be required to do an *Anders*-type review on post-conviction petitions. Otherwise, the Task Force agreed to recommend adoption of Mr. Steinfeld's proposed amendments and form, which places on counsel the responsibility to review the record. Members also agreed to adopt a proposed comment to Rule 32.4(d).

Privilege. Rule 32.4(f) is a new provision and addresses the issue of whether the attorney-client privilege extends to PCR counsel; or whether a waiver from the defendant is necessary for counsel to obtain the file, including privileged information within the file, from trial counsel. The rule clarifies that the privilege extends to PCR counsel, and that PCR counsel needs neither a waiver from the defendant nor a court order to access trial counsel's file. Members supported the proposed rule.

5. Rule 32.6.

Waiver of privilege. Members proceeded to an issue concerning waiver of the attorney-client privilege if the defendant raises an ineffective assistance of counsel claim in a post-conviction proceeding. Mr. Euchner presented a new Rule 32.6(a)(2), Workgroup 1's proposal for addressing this issue. The proposed provision allows the State to request a court order requiring the defendant to disclose material information if the petition requires inquiry into material or information that is covered by a privilege, such as ineffective assistance. One of the four subparts of this provision would require the court to hold a hearing to assure that the defendant knowingly waived the privilege. The second subpart provides that a subsequent order would be limited to material necessary to respond to the defendant's claim. A third subpart requires defendant's counsel to be present if the prosecutor interviews the defendant. A fourth subpart would require dismissal of a claim if the defendant refuses to waive the privilege and the refusal prevents the prosecutor from effectively responding to the claim.

Members disfavored the first subpart, which requires the court to hold a hearing and have a colloquy with the defendant to obtain a knowing waiver. This would present logistical issues and might impede the petition's progress. If the defendant is self-represented, it also could necessitate the appointment of advisory counsel. Several members suggested that a written waiver of the privilege should be sufficient. Mr. Euchner responded that the workgroup would revise the provision to delete the need for a hearing and to allow a written waiver, and the workgroup will present the rule again after that has been done.

6. Rule 32.9.

Notice to the appellate court (part 2). Proposed Rule 32.4(a)(4)(B), *supra*, requires the superior court clerk to send a copy of a final rule in the PCR proceeding to the appropriate appellate court, as provided in Rule 32.9(c). This companion provision repeats that requirement and requires defendant's counsel or a self-represented defendant to also inform the appellate court of any trial court ruling granting or denying relief on a post-conviction notice or petition. Members had no objections to the new provision.

Extensions of time. Ms. Beckmann presented revisions to Rule 32.9(d)(1) concerning requests to extend the time for filing a petition or cross-petition for review, or for filing a delayed petition or cross-petition for review. The proposed rule has one subpart if the request is filed before the time has expired, and a second subpart for delayed filing, that is, when the time has expired but the court excuses it. Ms. Beckmann noted that if the trial court grants the request in either scenario, it will need to set a deadline for filing the petition or cross-petition (or the delayed petition or cross-petition). Members had no objection to this revised rule, but the Chair asked staff to assure that these provisions are parallel to provisions in Rule 31 for requesting extensions of time on petitions and cross-petitions for review in an appeal.

Appendix to a petition for review. Ms. Gard reviewed extensive changes to Rule 32.9(d)(4), which concerns an appendix to a petition or cross-petition for review. The current rule (Rule 32.9(c)(5)) distinguishes the appendix in capital and non-capital cases. Ms. Gard explained that the distinction arose because the trial court sent a paper record to the appellate court in non-capital cases, but not in capital cases, where the paper record was more voluminous. The record is now sent electronically in both types of cases, and Ms. Gard's revisions conform the rule to the current practice. Because the appellate court now has the complete record, an appendix would be optional in both capital and non-capital cases. Members had no changes to her proposed revisions.

7. Other Rule 32 matters.

Form comparisons. Mr. Steinfeld advised that he worked with Judge Viola to compare current Rule 41 Forms 24(b), 25, and 26 with the current rules to discern if there were any discrepancies. Rule 32 refers to the forms, and the forms rather than the rules provide the required content, so they found no discrepancies. They did, however, recommend a few modifications to the forms, as shown in the materials at pages 57-59 of today's meeting packet, such as adding after a series of checkboxes on the PCR notice that refer to specific rule subparts for relief.

Change of judge. Mr. Euchner noted that subpart (a)(4) of current Rule 10.2 ("Change of judge as a matter of right") provides, "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." Mr. Euchner, working with Workgroup 3, proposes to delete that provision. Current Rule 10(f) already provides that a change of judge is not available on a remand for resentencing, so the last 5 words of subpart (a)(4) are redundant. Current Rule 10(e) provides that a party waives a change of judge of right if the party participates in any contested proceeding before that judge. The workgroup would add to that waiver provision the words "or sentencing" to clarify that appearing before the judge for sentencing operates as a waiver. With the deletion in section (a) and the addition in section (e), a party to a Rule 32 proceeding would have the same opportunity for a change of judge as a matter of right as the party would have in pretrial stages of the criminal process. Specifically, if a new judge is assigned to a Rule 32 matter because the original judge is unavailable, and if the party has not previously used or waived the right, the party can exercise the challenge against the newly assigned judge.

The workgroup also proposed a comment to the revised rule. While discussing the comment, members considered whether a provision on a change of judge as a matter of right in a Rule 32 proceeding should remain associated with Rule 10.2, or whether Rule 32.4(f) (“assignment of a judge”) would be a more suitable location. Judge Johnson advised that Workgroup 3 would study this further. The comment might be useful if the provision remains in Rule 10.2 but be less useful if it’s moved to Rule 32.4.

8. **Call to the public.** Mr. George Papa responded to a call to the public. He reiterated the concern he expressed at the March Task Force meeting: that a post-conviction proceeding should not be assigned to the original judge, but that to enhance objectivity and avoid conflicting interests, it should instead be assigned to a new judge. Members discussed Mr. Papa’s comment, but none saw any need to change the rules as he requested, and they took no action on his suggested change.

9. **Adjourn.** The Chair confirmed August 31, 2018, as the next Task Force meeting date. The meeting adjourned at 3:57 p.m.

TO: Rule 32 Task Force

FR: Pete Eckerstrom

RE: Preclusion/Illegal Sentence Claims Raised Under Rule 32.1(C), Separation of Powers Considerations.

The Problem:

At the Arizona Court of Appeals, we handle a high volume of petitions for review of denials of post-conviction relief – between one and two hundred each year in Division Two alone. We affirm the denial of most underlying claims on procedural grounds under Rule 32.2. In most cases, we can quickly divine that the claims have been raised untimely or could have been raised in a prior appeal or previous Rule 32 petition. In this respect, our preclusion rules under 32.2 serve us well in efficiently creating finality on claims that are, either legally or procedurally, farfetched.

However, we do encounter a species of claim for which Rule 32.2 currently requires preclusion but which seems unsettling to reject exclusively on procedural grounds: substantively correct claims that a petitioner is serving a “sentence imposed which exceeds the maximum sentence unauthorized by law, or is otherwise not in accordance with a sentence authorized by law.” This is a specified ground for relief under Rule 32.1(c) subject to the full weight of our preclusion bars under 32.2(a). Judge Nichols, our workgroup’s superior court judge, observed that she has encountered this problem as well. If a defendant is indeed serving time beyond that authorized by Arizona law, we question whether they should remain unlawfully in custody simply because the claim has been raised untimely or because their prior counsel overlooked it.

Indeed, our experience has been that meritorious illegal sentence claims (as narrowly defined under 32.1(c)) are often not identified by incarcerated petitioners until they approach the end of their sentences: a time when they seek a formal calculation of their release date from DOC. When DOC’s calculations do not conform to their understandings of their release date, they then contact an attorney or send letters to their sentencing judge seeking clarity. By this time, any claim that they have been unlawfully sentenced, or that they are being held beyond their sentence, whether valid or not, will have become untimely (and precluded for that reason) or could have been raised in their direct appeal (and would be precluded for that reason).

The Solution:

Our workgroup is therefore recommending that claims under Rule 32.1(c) receive the same treatment as those raised under Rule 32.1 (e) through (h). In those cases, we still maintain the procedural hurdles enforcing finality set forth in Rule 32.2(a)(1) through(3), but allow the trial court to reach the merits if the petitioners have acknowledged the bar to finality and “explain the reasons” for not raising the claim sooner. This provides a procedural avenue for such claims to be considered on the merits when they are non-frivolous. The proposed change could be executed without a significant new drafting by simply inserting the words “Rule 32.1(c)” in the first sentence of Rule 32.2(b).

Separation of Powers Concern:

This change, like many others under consideration by the Task Force, would deviate from our state’s statute addressing the same subject matter. *See* A.R.S. § 13-4231 and 13-4232 (setting forth no preclusion exception for claims raised under Rule 32.1(c)). Therefore, we must consider whether, as a general matter, we should feel constrained by statutes in proposing rule changes to Rule 32. And, we must analyze to what extent each particular proposal can be characterized as a change to procedural law (the exclusive domain of the judicial branch) or substantive law (the domain of the legislature). *See State v. Bejarano*, 158 Ariz. 253, 254 (1988)(approving reasoning in *State v. Fowler*, 156 Ariz. 408, 411-412 (app. 1988)(applying substantive/procedural criteria for resolving separation of powers dispute in the context of Rule 32).

One can argue that both A.R.S. § 13-4231 *et seq* and Rule 32 are primarily concerned with promulgating the procedure by which petitioners can bring post-appeal challenges to their convictions and sentences. Indeed, neither the statutory scheme nor the rule articulate any substantive law defining elements of crimes, affirmative defenses to them or statutory sentencing ranges (all traditional provinces of the legislature). For these reasons, one can plausibly maintain that our Task Force operates exclusively in the arena of procedural law: an arena where the judicial branch holds the exclusive power under the Arizona Constitution. Under this view, which finds support in our jurisprudence (see above), the Arizona Supreme Court need only be concerned with contradicting the statute to the extent it might be driven by considerations of comity with the legislative branch. *See, Seisinger v. Siebel*, 220 Ariz. 85 ¶8 (2009) (appropriate for legislature to participate in procedural rulemaking so long as its resulting legislation supplements and does not conflict with rules promulgated by judicial branch). To the

extent, our highest court views A.R.S. § 13-4231 *et seq* as expressing the public policy views of the public, the court might view the policy implied in the statute as important – but non-binding -- inputs in exercising its exclusive authority over post-conviction procedures.

How much persuasive weight the supreme court should give to implicit public policy expressed through a statute *enacted in 1992* is open to question. Notably, our Task Force has been selected to comprehensively include those who have *contemporary* expertise, from different perspectives, on how our post-convictions rules are functioning in practice in 2018 – after 25 years of experience under the current scheme set forth by statute and rule.

We must also consider how much weight we give 13-4231 *et seq.* as to any *specific amendments* to Rule 32 that we ultimately recommend. There is a logical distinction between amendments that enable, amplify or augment the statutes and those which conflict with the legislature’s vision. Amendments or edits which only do the former may not trigger “separation of powers” concerns at all. But proposed changes might also contradict a more substantive provision of the statute. For example, the itemization of the “grounds” for relief, set forth in Rule 32.1 and which generally track the statute, can be viewed as the least procedural and most substantive portion of the Rule. It is therefore an arena where the legislature carries its greatest claim to authority in the separation of powers calculus. Thus, to the extent we consider either expanding or contracting those “grounds for relief,” we operate in a domain where the supreme court may wish to take a more gentle hand.

We now turn to the specific change we recommend above. In essence, we propose relaxing the preclusionary standards for “illegal sentence” claims. This conflicts with the statute: § 13-4231 *et seq* subjects such claims to mandatory preclusion if they not raised timely or during the first procedural opportunity after conviction. But, that proposed change operates in the arena of procedure not substantive law. In short, the supreme court has the unambiguous authority to make the change if it agrees that the change strikes the correct balance between fairness and finality.

MEMORANDUM

To: Judge Cathleen Nichols
From: Beth Beckmann
Re: Claims of Lack of Jurisdiction Under Rule 32.1(b); Preclusion and Untimeliness
Date: August 15, 2018

A defendant is entitled to relief under Rule 32.1(b) if “the court did not have jurisdiction to render a judgment or to impose a sentence on the defendant.” Although there is well-established authority for the proposition that lack of subject matter jurisdiction cannot be waived and can be raised at any time, Rule 32.1(b) claims are waived and deemed precluded by Rule 32.2 if not raised at trial, on appeal or in a prior Rule 32 proceeding, and are barred if not raised within time limits of Rule 32.4. Assuming “jurisdiction” under 32.1(b) includes “subject matter jurisdiction,” as well as a broader lack of authority, such as lack of personal jurisdiction or lack of statutory authorization, how can that be reconciled with the notion that subject matter jurisdiction cannot be waived but can be challenged at any time? Should the rule be amended to distinguish subject matter jurisdiction for purposes of preclusion and a time bar, from all other claims of lack of authority? And would this result in a conflict between the rule and the statute, specifically § 13-4231(A)(2), which provides relief when the court lacked jurisdiction, and § 13-4232(A) and (B), the statutory preclusion provision, which, like the rule, deems waived claims of lack of jurisdiction waived if not previously raised?

In his email and the attachments, David provided you with some general cases on subject matter jurisdiction, cases that define subject matter jurisdiction and state

the general principle that it can be raised at any time. *State v. Chacon* was a direct appeal from a probation revocation proceeding. *Serrano*, too, was a direct appeal. *State v. Bryant*, has a good discussion of the meaning of jurisdiction and the difference between a voidable order or sentence, such as one that is illegally lenient and not challenged or, in that case, providing the defendant with relief the court was not authorized to give, and a judgment that is void because entered by a court that lacked jurisdiction. The court found that the language it had used in an earlier case, *State v. Vargas-Burgos*, which pertained to an illegally lenient and therefore voidable sentence, had been imprecise. Again, *Bryant* was an appeal.

State v. Espinoza is probably the most relevant here in terms of illustrating the dilemma of jurisdictional issues in the context of Rule 32.1(b). That case was an appeal by the state from the trial court's dismissal of charges that were based on the incorrect belief that years earlier the defendant had been required by the juvenile court to register as a sex offender. That erroneous belief resulted in a conviction in 2004 for failure to register, followed by unsuccessful post-conviction proceedings and a new charge for the same offense. The case illustrates the difficulty of finding a subsection for this defendant to raise what was clearly a meritorious claim, without it being subject to dismissal for untimeliness and preclusion. The court of appeals characterized the error as jurisdictional in nature insofar as the latest, dismissed charge was concerned. It observed that not all legal errors are jurisdictional errors, noting that the two had been conflated in many cases. The court relied on the supreme court's decision in *State v. Maldonado*, 223 Ariz. 309, ¶¶ 15–18 (2010), finding “no longer tenable” the reasoning in earlier cases in

concluding that procedural defects in the charging process amounted to jurisdictional error. Similarly, the court pointed to *Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 101-02 (1995), in which had noted the “imprecise use” of jurisdictional language in cases involving error that was not truly jurisdictional. As the court pointed out in *Espinoza*, the supreme court observed in *Maldonado*, 223 Ariz. 309, ¶ 15, 223 P.3d at 655, the conclusion that “a court cannot enter a valid judgment because of a procedural error does not mean that the court lacks subject matter jurisdiction.” Rather, “the phrase ‘subject matter jurisdiction’ refers to a court's statutory or constitutional power to hear and determine a particular type of case.” *Id.* ¶ 14. The end of that decision is worth quoting here:

¶ 34 When we encounter questions of subject matter jurisdiction raised for the first time long after a judgment has been entered, we enter an arena of the law where the competing values of validity and finality in judgments come into inevitable conflict. As both the Restatement of Judgments and our supreme court have acknowledged, the law of jurisdiction often has been directed and distorted by the comparative weight of those values in the individual case. See *Maldonado*, 223 Ariz. 309, ¶¶ 16-18, 223 P.3d at 655-56; Restatement § 11 cmt. e, § 12 cmt. a, b. In the context of challenges to criminal judgments that have become final, our state has adopted a modern approach, in conformity with the Re-statement, which resists the temptation to characterize even serious procedural irregularities as violations of jurisdictional court authority. See, e.g., *Maldonado*, 223 Ariz. 309, ¶ 18, 223 P.3d at 656. But true jurisdictional limitations on a court's authority remain and it is our conclusion that one of those boundaries has been breached here. It is mere happenstance that the breach occurred in an individual case where the equities of finality and validity weigh so heavily in favor of voiding the judgment.

There are other cases worth looking at in terms of the principle of subject matter jurisdiction versus other kinds of what can be referred to as little jurisdiction or

authority. Many are memo decisions but I think they still illustrate the problem that parties and courts are wrestling with.

In *State v. Jackson*, 208 Ariz. 56, ¶ 20 (App. 2004), for example, Division Two distinguished lack of jurisdiction based on a statute of limitations with subject matter jurisdiction, or “pure, territorial jurisdiction” of the type that had been addressed in the supreme court’s decision in *State v. Willoughby*, 181 Ariz. 530, 892 P.2d 1319 (1995). The court stated in *Jackson* that in certain circumstances, a limitations period can be waived, 208 Ariz. 56, ¶ 22. But the court pointed out, in *Willoughby*, the jurisdictional issue was “that Arizona lacked subject matter jurisdiction to try [the defendant] for crimes committed in Mexico,” 181 Ariz. at 535, an issue that could not be waived because, “[s]ubject matter jurisdiction . . . may not be waived or changed.” *Id.* at 537–38 n. 7. See also *State v. Marks*, 186 Ariz. 139, 141, 920 P.2d 19, 21 (App. 1996) (“Personal jurisdiction may be waived; subject matter jurisdiction may not.”). In addition to the well-established case law on the fact that subject matter jurisdiction can be challenged at any time, case law establishes that when a defendant enters a plea, he or she waives any non-jurisdictional defects, again suggesting true subject matter can be challenged. *State v. Zunino*, 133 Ariz. 117, 118 (App. 1982); see also *State v. Alford*, 98 Ariz. 124, 128 (1965) (defendant waives challenge to voluntariness and admissibility of confession by guilty plea). The question arises, are we to assume the legislature and the supreme court deliberately cut off a defendant’s right to raise true subject matter jurisdiction at any time when the statutes were enacted and the rule promulgated?

Thus, there is obvious tension between these principles and Rule 32's preclusion and timeliness provisions, some of which can be resolved by distinguishing big jurisdiction, that is, subject matter jurisdiction, from other kinds of jurisdiction. In *State v. Banda*, 232 Ariz. 582, ¶ 1 (App. 2013), for example, the defendant argued on review that, "because the protection of the statute of limitations is jurisdictional, the [trial] court [had] erred in concluding he had waived the application of the statute to an offense to which he had pled guilty and for which the limitations period had elapsed." Agreeing with the defendant that Arizona has adopted the minority rule that a statute of limitations implicates the court's jurisdiction and thus limits "the power of the sovereign to act against the accused," *id.* ¶ 9, quoting *State v. Fogel*, 16 Ariz. App. 246, 248, 492 P.2d 742, 744 (1972), the court found that this did not mean the defendant did not and could not waive the limitations period by entering the plea. Noting his plea agreement expressly provided he had waived all defenses, the court reasoned that notwithstanding the jurisdictional implications of a limitations period, it remained an affirmative defense that could be waived, consistent with a number of courts, citing *Jackson*, 208 Ariz. 56, ¶ 22. The court reasoned that "the waiver of a statute-of-limitations defense is consistent with the general rule that the limitations period prescribed by statute implicates the court's jurisdiction over the person for that offense, but not subject matter jurisdiction." *Banda*, 232 Ariz. 582, ¶ 9. The court relied on *Jackson* for the proposition that the jurisdictional effect of the statute of limitations cannot be compared to subject matter or "territorial" jurisdiction, which cannot be waived and can be raised at any time. *Id.* quoting *Jackson*, 208 Ariz. 56, ¶¶ 21, 23. The court seemed to imply that subject matter jurisdiction, which

pertain to the court's "statutory or constitutional power to hear and determine a particular type of case," id. ¶ 10, quoting *State v. Maldonado*, 223 Ariz. 309, ¶ 14 (2010), can be raised under Rule 32.1(b) at any time, presumably notwithstanding Rule 32.2 and 32.4, whereas other kinds of "jurisdictional" claims, like a statute of limitations and personal jurisdiction, may be barred on the grounds of waiver and untimeliness.

There are a number of memorandum decisions in which the courts have wrestled with this tension between the general rule that true subject matter jurisdiction can be raised at any time and Rule 32.2 and 32.4. (Judge, you'll note that most are Division Two cases, but that is because until maybe 5 years ago, Division One was resolving their Rule 32 petitions for review by order, not memo decisions; the only ones for that period you'll find in Westlaw are those that were published as opinion.).

In *State v. Demaree*, No. 2 CA-CR 2015-0312-PR (Ariz. Ct. App. filed Dec. 1, 2015) (mem. decision), the defendant argued that the trial court had lacked jurisdiction to render judgment against him because the acts related to his fraudulent obtaining of military retirement benefits belonging to his father, an area preempted by federal law. The court of appeals agreed with the state that the defendant's notice was untimely and his jurisdictional claim, raised pursuant to Rule 32.1(b), was not excepted from the timeliness requirement of Rule 32.4(a). The court stated, "Although we acknowledge that subject-matter jurisdiction cannot be waived, see *State v. Jackson*, 208 Ariz. 56, ¶ 21, 90 P.3d 793, 799 (App. 2004), Demaree has cited no authority suggesting the timeliness requirements of Rule 32.4(a) do not apply to jurisdictional claims," adding that the time limits of the rule are not based on waiver. The court went on to say that, in any event,

even if he could raise the claim in an untimely proceeding, it rejected the jurisdictional claim for the reasons it had rejected the same argument by his sister and codefendant. *See State v. Demaree*, No. 2 CA-CR 2015-0152-PR (Ariz. Ct. App. filed Jul. 29, 2015) (mem. decision).

In *State v. Walker*, No. 2 CA-CR 2016-0070-PR (Ariz. Ct. App. May 25, 2016) (mem. decision), the defendant had been convicted after a jury trial of sale of a narcotic drug and possession of a narcotic drug for sale, and had been successful on appeal and was resentenced. He filed a petition for a writ of habeas corpus, really a Rule 32 proceeding, based on what he claimed was a significant change in the law regarding the requirement that a jury decide release status. The court agreed there had been a significant change for purposes of Rule 32.1(g), but concluded the outcome would not have been different under that law and any error was harmless. The defendant argued on review that the sentence imposed for an earlier conviction was “void” because he should have been placed on probation under A.R.S. § 13-901.01, and had the sentence been suspended, he would not have been on parole when he committed the instant offense; thus, he argued, the jury could have found he was not on release and the court erred in finding the error harmless. In a footnote, the court noted that Walker had also argued this question is one of subject matter jurisdiction, and asserted that although he “did not raise this issue below,” he can therefore raise it “at any point in the proceedings.” The court of appeals stated that the claim does not implicate subject matter jurisdiction and, in any event, such a claim is subject to preclusion. The court acknowledged the authority for the proposition that a challenge to subject matter jurisdiction ““can never be

forfeited or waived,” quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002), which is cited in other cases for this proposition as well, but concluded that Rule 32.1(b) claims are subject to preclusion nevertheless. In its discretion, the court addressed the merits of the claim in any event because the trial court had done so.

In *State v. Roush*, No. 2 CA-CR 2014-0096-PR (Ariz. Ct. App. filed Sept. 2, 2014) (mem. decision), the court of appeals concluded that the trial court correctly dismissed the defendant’s petition because none of the claims that he raised in the successive and untimely proceeding, including one that related to defects in the charging document, fell within an exception to the rule of preclusion. The court rejected the defendant’s assertion that the claim implicated subject matter jurisdiction and could not be precluded, acknowledging authority for the proposition that subject matter jurisdiction cannot be waived. See *United States v. Cotton*, 535 U.S. 625, 630 (2002). The court reasoned that the express provisions in Rule 32 designates claims of subject matter jurisdiction are raisable under Rule 32.1(b), adding that such claims are subject to preclusion under Rule 32.2(a) and (b). The court added, “Moreover, our supreme court has rejected the argument Roush makes here—that defects in a charging document deprive a court of subject matter jurisdiction.” The court relied on *State v. Maldonado*, 223 Ariz. 309, ¶¶ 13–14, 22–25 (2010) (state’s failure to file information was non jurisdictional claim subject to waiver), and *Cotton*, 535 U.S. at 630 (“[D]efects in an indictment do not deprive a court of its power to adjudicate a case.”). The challenge to the charging document was waived by the defendant’s failure to raise it at trial, on appeal or a prior Rule 32 proceeding.

Similarly, in *State v. Leon*, No. 2 CA-CR 2013-0383 (Ariz. Ct. App. filed Nov. 29, 2013) (mem. decision), the trial court had dismissed the defendant's successive and untimely PCR petition after it found the defendant had not stated any ground for relief. On review, the defendant argued, among other things, that the trial court had lacked subject matter jurisdiction, a claim that could not be waived. The court of appeals found the trial court had not erred in summarily dismissing the petition because subject matter jurisdiction is subject to the preclusive effect of Rule 32.2(b) and the defendant had not raised the claim at trial or in the prior proceeding.

In *State v. Pember*, No. 2 CA-CR 2015-0464 (Ariz. Ct. App. Jan. 26, 2016) (mem. decision), the defendant asserted that certain of his claims could not be precluded because he did not waive them, citing *Stewart v. Smith*, 202 Ariz. 446 (2002). But the court pointed out that his notice was untimely, and *Stewart* did not apply because time limits of Rule 32.4(a) "are not grounded in waiver," citing *State v. Lopez*, 234 Ariz. 513, ¶¶ 8-9 (App. 2014). The court added, "And, although Pember is correct that subject-matter jurisdiction cannot be waived, see *State v. Jackson*, 208 Ariz. 56, ¶ 21, 90 P.3d 793, 799 (App. 2004), jurisdictional claims cannot be raised in an untimely proceeding, see Ariz. R.Crim. P. 32.1(b), 32.4(a)." This simply recognizes the conundrum without resolving it.

In *State v. Shatzer*, No. 1 CA-CR 15-0508-PRPC (Ariz. Ct. App. filed June 22, 2017), a fairly recent memo decision, Division One did the same thing as Division Two, finding a claim that the trial court was deprived of subject matter jurisdiction based on under Rule 32.1(b) untimely and precluded. The defendant argued in a proceeding commenced years after his conviction of multiple offenses, including child molestation,

pursuant to a plea agreement, that “the unlawful sentence [consecutive prison terms and lifetime probation] deprived the superior court of subject matter jurisdiction.” Note that like a number of the cases, this one was really a challenge as to the legality of a sentence, which is not truly subject matter jurisdiction, even though an illegal sentence is fundamental error. Division Two did a similar thing in *State v. Peterson*, No. 2 CA-CR 2015-0167-PR (Ariz. Ct. App. filed Aug. 18, 2015). In that case the defendant had argued the trial court lacked “subject matter jurisdiction to impose an illegal sentence” and tried to raise the issue in an IAC claim raised in a successive proceeding. The court agreed with the trial court the claims could not be raised in an untimely post-conviction proceeding, adding, “[e]ven if we agreed Peterson’s sentencing claims had a jurisdictional component, such claims nonetheless cannot be raised in an untimely proceeding. See Ariz. R. Crim. P. 32.1(b), 32.4(a).

Memo

To: Rule 32 Committee, Arizona State Supreme Court

From: Sam Myers, Dan Levey

RE: Preclusion

Date: July 29 2018

Rule 32.2(a) provides the grounds for which a defendant is precluded from relief. The rule closely mirrors the statutory corollary, A.R.S. §13-4232.

Rule 32.2(a): 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.

The exceptions to these preclusions are set forth in Rule 32.2(b).

Issue 1: The caselaw has created a significant exception to the preclusion limitations set forth above; since 1995, appellate courts have held that claims of “sufficient constitutional magnitude” may not be precluded in all circumstances. This concept has been discussed and refined over the past 20+ years, with a significant point of clarification that only claims requiring the defendant’s personal knowledge before a knowing, intelligent, and voluntary waiver could be made would qualify under the “sufficient constitutional magnitude” standard. Stewart v. Smith, 46 P.3d 1067 (Ariz. 2002).

A comprehensive discussion of the “sufficient constitutional magnitude” exception, including its application to IAC claims, is contained in State v. Swoopes, 216 Ariz. 390 (App. 2007). The Court later clarified that if a claim is untimely and doesn’t qualify for an exception under Rule 32.2(b), it will be precluded regardless of constitutional magnitude. State v. Lopez, 234 Ariz. 513 (2014).

Proposal 1: Add an exception in Rule 32.2(b) as follows: A claim that was filed in a timely manner or otherwise allowable pursuant to this subsection may be raised if it is of sufficient constitutional magnitude. “Sufficient constitutional magnitude” is defined as a constitutional right that can only be waived by a defendant personally.

Issue 2: The first sentence of 32.2(b) is very broad. Beth raised the concern that it could suggest that repeated litigation of a claim under 32.1(d) through (h) is permissible, and would therefore contradict the second sentence.

Proposal 2: Take no action unless the group sees this as a pervasive problem needing corrective action.

Issue 3: Rule 32.2(a)(3) precludes claims waived at trial. Beth raised the question as to whether the rule needs clarification that failure to raise an IAC claim in a Rule 24 motion (“at trial” for purposes of the rule), will not preclude it, given the court of appeals decision in State v. Sang Le, 221 Ariz. 580 (App. 2009).

Proposal 3: Take no action unless the group sees this as a pervasive problem needing corrective action.

Issue 4: Rule 32.2(a)(3) precludes claims waived in a previous collateral proceeding. In State v. Rosales, 205 Ariz. 86 (App. 2003), the court of appeals held that a first PCR petition that sought only leave to file a delayed appeal under Rule 32.1(f) did not waive other PCR claims that could have been raised in a first proceeding and such claims would not be precluded in a subsequent proceeding. Beth questioned if this exception should be reflected by the Rule.

Proposal 4: Take no action unless the group sees this as a pervasive problem needing corrective action.

Issue 5: Rule 32.2(a)(3) precludes claims waived in a previous collateral proceeding. In State v. Bennett, 213 Ariz. 562 (2006), the supreme court concluded that when initial Rule 32 counsel and appellate counsel were the same attorney, the defendant is not precluded from raising a claim of ineffective assistance of appellate counsel in the second Rule 32 proceeding, even though ineffective assistance of trial counsel has been raised in the first Rule 32 proceeding. Beth questioned if this scenario should be reflected by the Rule.

Proposal 5: Take no action unless the group sees this as a pervasive problem needing corrective action.

Issue 6: The language of Rule 32.2(c) identifies the State’s burden of proof to prove that an issue is precluded, but then says that the Court can find preclusion without the State having raised it. This seems contradictory.

Proposal 6: Take no action. While this may be a more pervasive problem than some of the previously raised issues, the Court must be able to *sua sponte* find that an issue has been precluded. Without this ability, the Court would be forced to permit claims to be litigated in Rule 32 that, by its own provisions, are precluded.

Memo

To: Workgroup 1

From: David Euchner

RE: Rule 32 Preclusion, Diaz/Goldin issues

Date: August 5, 2018

The purpose of Rule 32.2 is strike a balance between the fundamental rights of the defendant to ensure that the trial proceedings were fair and the interests of victims and the criminal justice system in finality of convictions. Ordinarily, Rule 32 claims are found to be precluded if the notice of post-conviction relief is filed untimely or if the claim is in a successive petition and does not fall within an exception as described in Rule 32.2(b). Recent developments in case law have narrowed the application of preclusion in the context of successive petitions as well as and untimely notices, yet the text of the rule continues to confuse. I suggest the following modifications to Rules 32.1 and 32.2 in an effort to bring the language of the rule into harmony with the cases that have interpreted the preclusion doctrine.

Successive petitions

In *Stewart v. Smith*, the United States Supreme Court certified the following question to the Arizona Supreme Court:

At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of sufficient constitutional magnitude to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3) depend upon the merits of the particular claim, or merely upon the particular right alleged to have been violated?

202 Ariz. 446, 447 ¶ 1 (2002). The Arizona Supreme Court decided that the rule should be the latter; regardless of the merits of the claim, the right alleged to have been violated must be one that is personal to the defendant such that a knowing, voluntary, and intelligent waiver must be made. *Id.* at 449-50 ¶¶ 9-10. The Court concluded:

With some petitions, the trial court need not examine the facts. For example, if a petitioner asserts ineffective assistance of counsel at sentencing, and, in a later petition, asserts ineffective assistance of counsel at trial, preclusion is required without examining facts. The ground of ineffective assistance of counsel cannot be raised repeatedly. There is a strong policy against piecemeal litigation. *See State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002). In other situations, the court must determine the particular right involved by looking at the facts of the claim, not to decide its merits, but to decide whether, at its core, the claim implicates a significant right that requires a

knowing, voluntary, and intelligent waiver for preclusion to apply under Rule 32.2(a)(3). Thus, if petitioner asserts ineffective assistance of counsel for the first time in a successive Rule 32 petition, the question of preclusion is determined by the nature of the right allegedly affected by counsel's ineffective performance. If that right is of sufficient constitutional magnitude to require personal waiver by the defendant and there has been no personal waiver, the claim is not precluded. If it is not of such magnitude, the claim is precluded.

Id. at 450 ¶ 12. In the context of claims of ineffective assistance of counsel (IAC), the court held that a claim of IAC must be raised in a single petition and not through piecemeal litigation. But, if a first petition did not raise IAC at all and the defendant instead raised IAC in a successive petition, then the only IAC claims that could be raised would be those involving a right personal to the defendant.

Division Two conducted a thorough analysis of *Smith*¹ in the context of a successive petition that used a “confusing approach” to avoiding preclusion and a trial court ruling that was “not entirely clear” in *State v. Swoopes*, 216 Ariz. 390, 396 ¶¶ 18, 20 (App. 2007). The petitioner alleged that a jury note and answer from the trial judge, found in 2002, constituted newly-discovered facts, because trial counsel did not recall the note and asserted that he would have objected to the answer that was provided to the jury as a comment on the evidence. The trial court rejected the claim that the evidence was newly-discovered, and Division Two upheld that finding as supported by the evidence. *Id.* at 394-95 ¶¶ 13-15. *Swoopes* alternatively pled that if this claim was properly couched as IAC instead of newly-discovered facts, then it should not be considered precluded under *Smith* because *Swoopes* was denied his personal right to be present at all critical stages of the proceedings and he was not made aware of the contents of the note “until his most recent petition was being prepared.” *Id.* at 395 ¶ 17. Division Two found that *Smith* did not support *Swoopes*'s argument but actually undermined it:

This is not a situation in which a petitioner “asserts ineffective assistance of counsel for the first time in a successive Rule 32 petition.” Having previously raised IAC claims in his first Rule 32 proceeding, “the nature of the right allegedly affected by counsel's ineffective performance” is neither determinative nor relevant. Rather, because IAC claims “cannot be raised repeatedly,” and because our supreme court has expressed “a strong policy against piecemeal litigation,” “preclusion is required without examining facts.”

¹ Most Arizona cases short-cite the case as *Stewart* though some use *Smith*. In keeping with the practice of federal courts, this memorandum uses the name of the defendant (*Smith*) and not the name of the director of the Department of Corrections (*Stewart*).

Id. at 398 ¶ 24 (quoting *Smith*, 202 Ariz. at 450 ¶ 12). Swoopes then argued that under *Smith* and Rule 32.2(a)(3), the right at issue—right to be present at all critical stages of the proceedings—was one that required a personal waiver. The court then explained why the defendant’s absence while answering a jury question did not implicate the Confrontation Clause and thus did not require a personal waiver. *Id.* at 399-402 ¶¶ 26-39. Thus, although the trial court couched the error in Swoopes’s trial as “fundamental,” “[n]othing in Rule 32.2, the court comment thereto, or *Smith* can be read to support this notion. Not all error that is fundamental involves the violation of a constitutional right that can be waived only if the defendant personally does so knowingly, voluntarily, and intelligently.” *Id.* at 403 ¶¶ 40-41.

Swoopes seemed to close the door on all successive petitions involving trial error, until the Supreme Court decided *State v. Diaz*, 236 Ariz. 361 (2014).² In this case, the defendant was appointed counsel for Rule 32 proceedings, but when counsel failed to file a petition within the prescribed time, the trial judge dismissed the notice; and when a second attorney in a second proceeding similarly failed to file a timely petition, again the trial judge dismissed. When a third notice was filed on *Diaz*’s behalf, followed by a petition, the trial court found the IAC claim precluded and the court of appeals affirmed. The Supreme Court reversed because the defendant should not suffer the consequences of his counsel’s failures under such circumstances. While allowing *Diaz* to raise his claim due to the “peculiar scenario” of that case’s procedural history, *id.* at 363 ¶ 12, the court explained *Smith*’s meaning in this manner:

PCR counsel can waive most claims of trial error on the defendant’s behalf by failing to assert them in a PCR petition. *Stewart v. Smith*, 202 Ariz. 446, 449 ¶ 9, 46 P.3d 1067, 1070 (2002). If the claim is of “sufficient constitutional magnitude,” however, the state must prove that the defendant knowingly, voluntarily, and intelligently waived the claim. *Id.* at 449–50 ¶¶ 9–10, 46 P.3d at 1070–71; *see also* Ariz. R. Crim. P. 32.2, cmt. (“[S]ome issues not raised ... in a previous collateral proceeding may be deemed waived without considering the defendant’s personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved.”).

Whether a defendant must personally waive an IAC claim to warrant preclusion under Rule 32.2(a)(3) depends on the particular right implicated by the allegedly ineffective representation. *Stewart*, 202 Ariz. at 450 ¶ 12, 46

² This opinion was the fourth in Mr. *Diaz*’s case. *State v. Diaz*, 222 Ariz. 188 (App. 2009), *vacated*, 224 Ariz. 322 (2010) (State may elect to pursue sentencing under repetitive offender statute instead of methamphetamine-sale statute); *State v. Diaz*, 228 Ariz. 541 (App. 2012) (finding no rule that barred trial judge from dismissing two separate Rule 32 proceedings when both attorneys failed to file petitions within the prescribed time).

P.3d at 1071. The defendant must personally waive an IAC claim only if the attorney's alleged defective performance affected a right of sufficient constitutional magnitude. *Id.*; *State v. Swoopes*, 216 Ariz. 390, 399 ¶ 28, 166 P.3d 945, 954 (App. 2007) (“[T]o avoid preclusion, a defendant must show a constitutional right is implicated, one that can only be waived by a defendant personally.”). The IAC claim here does not implicate such a right because defendants do not have a constitutional right to a plea bargain. *See Rivera–Longoria v. Slayton*, 228 Ariz. 156, 158 ¶ 10, 264 P.3d 866, 868 (2011).

Id. at 362 ¶¶ 8-9. The court further explained: “Preclusion is designed to require a defendant to raise all known claims for relief in a single petition, and thereby prevent endless or nearly endless reviews of the same case in the same trial court. Permitting Diaz to file his first petition to assert an IAC claim under the circumstances here will not result in repeated review of the IAC claim; it would result in its first review.” *Id.* at 363 ¶ 12.

It would be too easy to confine *Diaz* to its “peculiar” facts. Doing so would ignore the logic of the Supreme Court’s opinion and the purpose of precedent, which is to guide future cases that may not be identical but share commonalities. On occasion, defense attorneys fail to discharge their duties to their clients in a manner that far surpasses mere ineffectiveness. *See, e.g., State v. Varela*, __ Ariz. __, ¶¶ 11-14, 2018 WL 3387374 (App. 2018) (defendant alleged that appellate counsel dismissed the appeal without consulting defendant; claim entitled to an evidentiary hearing); *State v. Sainz*, 2 CA-CR 2017-0381-PR, 2018 WL 2175801, n.1 (App. 2018) (trial counsel’s conflict of interest was so obvious that appellate court not only granted a new trial without an evidentiary hearing but also referred both trial counsel to state bar for investigation of ethical violations). Appellate and post-conviction attorneys often file *Anders* briefs in appeals, *Montgomery* notices in Rule 32 proceedings, or Rule 106(G) affidavits in appeals from juvenile court, even though there are clear issues to raise and brief to the court. *E.g., State v. Thompson*, 229 Ariz. 43 (striking *Anders* brief for noncompliance with *Anders* procedure); *Martinez v. Ryan*, 566 U.S. 1 (2012) (recognizing that Arizona does not provide a procedural mechanism for challenging ineffective assistance of Rule 32 counsel); *Stokley v. Ryan*, 705 F.3d 401, 406 (9th Cir. 2012) (Paez, J., dissenting) (“postconviction counsel ... actively undermined the work of Stokley’s replacement counsel and prevented Stokley from investigating and raising his own claims”); *Tammy M. v. DCS*, 242 Ariz. 457, 460 ¶ 12 & n.4 (App. 2017) (counsel filed affidavit stating he could find no non-frivolous issues, but defendant wrote brief identifying issue upon which appellate court reversed).

Under *Diaz*, what seems to be most important is that the petitioner get a first full and fair opportunity to raise all possible claims. Smith filed at least three petitions, and Swoopes filed at least two, and thus their claims in successive petitions might be subject to preclusion on those grounds. But there seems to be no meritorious distinction between the failure by post-conviction counsel to file a petition on time, as was the case in *Diaz*, and the everyday

failures of post-conviction attorneys throughout the state to file a petition because they aver to the court that they could find no arguably meritorious issues. The defense bar is well aware of the fact that many post-conviction lawyers who file *Montgomery* notices are simply lying about reviewing the record.³ *Diaz* calls upon trial courts to provide petitioners with such an opportunity.

Untimely Notices

At sentencing, the trial court advises the defendant of the right to seek review through a direct appeal and/or post-conviction relief. Ariz. R. Crim. P. 26.11(a)(1). The defendant is provided a written copy of those rights, *see* Rule 41, Forms 24(a) & 24(b), and signs a document filed with the clerk as evidence of being informed of those rights. In the case of an “of-right” post-conviction proceeding,⁴ the deadline is ninety days after sentencing, and in “other noncapital cases,” the deadline is ninety days after sentencing or thirty days after the issuance of the appellate court mandate, whichever is later. Rule 32.4(a)(2)(c)-(d).

If an untimely notice is filed, and a claim is not being raised under Rule 32.1(d)-(h), then the notice is subject to summary dismissal. An untimely notice must identify the claim under Rule 32.1(d)-(h) that is being raised and allege some facts to support the claim. For example, a claim alleging a significant change in the law must identify which law was changed that impacts the defendant’s case. The interests in a timely petition were stated by our supreme court in this manner:

By requiring that all post-conviction claims be raised promptly, Rule 32.2(a) not only serves important principles of finality, ... but also allows any relief to be issued at a time when the interests of justice, from the perspectives of the defendant, the State, and the victim, can be best served. If a new trial or further proceedings are required, these can take place promptly, before the defendant has suffered undue prejudice and evidence becomes stale.

State v. Shrum, 220 Ariz. 115, 118 ¶¶ 12-13 (2009).

The trial judge who receives a notice of post-conviction relief may summarily dismiss it if it is defective and fails to state a legal claim. The judge also may determine that a factual allegation is contradicted by the clear record or that a factual allegation does not satisfy the legal requirements for that claim. In *State v. Harden*, 228 Ariz. 131 (App. 2011), a defendant pled guilty and was sentenced to a prison term followed by a consecutive term

³ The most notable example was Richard Parrish of Tucson who, at the time of his death, was ordered by the Pima County Superior Court to reimburse Pima County for approximately \$75,000 in false billing.

⁴ The Rule 32 Task Force is considering proposals to change the name of this type of proceeding.

of probation, and eleven months later, he filed a notice of post-conviction relief alleging that a miscommunication or misunderstanding related to his probation conditions constituted newly discovered facts. The court held that this allegation did not fall within “newly discovered facts” because the facts of the probation conditions became known to the defendant at sentencing. Thus, there was no exception to the timeliness requirement and the notice was properly dismissed by the trial judge.

In *State v. Lopez*, 234 Ariz. 513 (App. 2014), the defendant claimed that he should be excused from the timeliness requirement because the issue implicated by the petition—a plea that was not knowing or intelligent as to its terms—fell within the exception to preclusion provided in *Smith*. The trial court excused untimeliness and denied relief on the merits. *Id.* at 514 ¶ 3. On review, the court of appeals determined that the claim was precluded because Rule 32.4(a) specifically stated that “[a]ny notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h),” and Lopez did not raise any claim under those subsections. *Id.* at 514-15 ¶ 5. Because *Smith* discussed the waiver provision of Rule 32.2(a)(3) and not the timeliness provision of Rule 32.4(a), it did not apply. *Id.* at 515 ¶ 8.

In *State v. Goldin*, 239 Ariz. 12 (App. 2015), a defendant pled guilty and was advised—not only by trial counsel but by State’s counsel and the trial court—that his sentence for the current offense would be run consecutively to the sentence for a conviction in a separate case, but that he would receive time credit for 988 days served between his arraignment on the current case and sentencing. Several months later, Goldin learned from prison officials that he would not be receiving that time credit. Because his notice was untimely, the trial court found that his IAC claim was precluded.

Division Two granted partial relief to Goldin, “[b]ased on our supreme court’s decision in [*Diaz*], and the unique circumstances of this case.” In its draft decision distributed prior to oral argument, the court raised the issue of *Diaz*’s applicability here, and the State argued in response that “the reasoning and holding in *Diaz* could completely undermine the rules of preclusion if not strictly confined to very unusual cases.” *Goldin*, 239 Ariz. at 16 ¶ 19. The court determined that *Diaz* was not so different from the circumstances here. *Id.* at 16-17 ¶ 19. Ultimately, the court held that

Based on *Diaz*, we cannot conclude that any of Goldin’s actions or inaction could be construed as a waiver of his Rule 32 rights. Rather, just as in *Diaz*, Goldin was “blameless” and allowing his claim to move forward would result in a “first review,” not repeated review.

Id. at 17 ¶ 23 (citing *Diaz*, 236 Ariz. at 363 ¶¶ 11-12). The court determined that Goldin made a colorable claim for relief under Ariz. R. Crim. P. 32.1(f) based on blamelessness for the untimely notice of post-conviction relief. *Id.* at 18 ¶ 25.

Goldin does not cite *Lopez*, much less attempt to distinguish it. The pertinent facts of the two cases are indistinguishable; both involved untimely challenges to plea agreements based on a belief that the actual sentence to be served was shorter than that which was imposed. One other point of similarity of the two cases is both were authored by Judge Howard (and Judge Vasquez was a concurring judge on both cases as well). A logical inference is that Judge Howard recognized that *Diaz* undermined the holding in *Lopez*, and thus the court of appeals needed to reconsider the question anew.

Goldin itself explains that similarly-situated petitioners should be treated the same, and that was its basis for finding that *Goldin* was excused from the timeliness requirements. For this reason, any other defendant filing an untimely notice must also be given an opportunity to state why the defendant is not to blame for the untimeliness under Rule 32.1(f). As such, the text of the rule should reflect this evolution in the case law.

Proposed Modifications

The proposed modifications to Rules 32.1(f) and 32.2(a)(3) incorporate the reasoning of *Smith*, *Swoopes*, *Diaz*, and *Goldin*.

Rule 32.1(f) should clearly recognize a defendant's right to file a first petition as soon as the grounds for said petition are discovered, so long as the defendant explains in the notice why the notice is untimely.⁵

Rule 32.2(a)(3) should explain the difference between a claim that is "waived" at trial or on appeal, and thus must be raised as an IAC claim, and a claim that was not raised in prior collateral proceedings and thus may not be raised in a successive proceeding unless it satisfies the rule in either *Smith* or *Diaz*.

Additional Research Regarding Rule 32.1(f)

At Friday's Task Force meeting, another member mentioned to me that there is case law stating that a request for a delayed appeal / PCR notice under Rule 32.1(f) would result in preclusion of future claims, since this was the first Rule 32 petition. In *State v. Rosales*, 205 Ariz. 86 (App. 2003), the court held the opposite to be true and found that applying preclusion in such a circumstance would be bad public policy.

⁵ The proposal contains two other changes to Rule 32.1(f). The first is stylistic: changing "within the required time" to "timely." The second is substantive: it deletes the term "of-right" as a modifier of notice of post-conviction relief. There is no reason why untimeliness should only be excused when filing a notice from a plea and not a notice from a trial. If anything, the opposite should be the case, because a defendant always receives personal notice of the deadline after being sentenced pursuant to a plea but gets no notice of appellate proceedings until long after they are completed if counsel is not diligent.

Rule 32.1: Scope of Remedy

Grounds for Relief.

(a)-(e) – No Change

(f) the failure to file a timely notice of post-conviction relief ~~of right~~ or a notice of appeal ~~within the required time~~ was not the defendant's fault, or the ground for filing a notice of post-conviction relief was not known to the defendant within the required time limit;

(g)-(h) – No Change

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 or, on appeal, ~~or and not raised~~ in any previous collateral proceeding, except when the right at issue requires a knowing, intelligent, and voluntary waiver made personally by the defendant.

(b) Exceptions. Rule 32.2(a) does not apply to claims for relief based on Rule 32.1(d) through (h). A claim under Rule 32.1(d) through (h) that defendant raises in a successive or untimely post-conviction notice must include the specific exception 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.~~

Memorandum

To: Rule 32 Task Force

From: Jennifer Y. Garcia; Ellie Hoecker; Charlotte G. Merrill

Date: August 24, 2018

Re: Revisions to Arizona Rule of Criminal Procedure 32.1(h)

Issue 1: Arizona Rule of Criminal Procedure Rule 32.1(h) provides a post-conviction ground for relief when: “(h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt, or that the death penalty would not have been imposed.”

In a recent concurrence, Vice Chief Justice Pelander pointed out that a prior version of Rule 32.1(h) could be read to require a backwards-looking subjective inquiry into what the original sentencer would have done. He explained that the rule “on its face compelled the PCR court, a judge who was not involved in the underlying trial or sentencing process, to speculate as to the decision that the trial court (a different, and now deceased, judge) would have made decades earlier, and to embrace that speculation on a clear-and-convincing standard.” *State v. Miles*, 243 Ariz. 511, 414 P.3d 680, 687 (2018). He acknowledged, however, that the current rule, as restyled in 2018 (and quoted above) “might be read to impose a more objective, workable standard of review that requires the PCR court to determine whether any reasonable fact-finder would have imposed the death penalty, rather than whether a specific individual would have done so in the past.” *Id.*

Thus, the question is whether the rule should be amended to express that the determination under Rule 32.1(h) is made considering an *objective* standard.

Solutions:

Given the rule’s 2018 restyling, no change is necessary. This is especially so because the Arizona Supreme Court has now made clear that “construing the rule as imposing a subjective standard would require a PCR court to speculate about a particular sentencer’s ruling—an unmanageable, if not impossible, standard. The better reading is that Rule 32.1(h)’s reference to ‘the court’ means a reasonable sentencer, whether a judge or a jury.” *Miles*, 243 Ariz. 511, 414 P.3d at 683. The Court’s precedent now clarifies the rule’s standard and no amendment is necessary.

However, if the Task Force feels the Court should amend Rule 32.1(h) to express the “objective” nature of its inquiry, I would propose the following change:

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

Issue 2: Other Proposals to Change the Scope to Rule 32.1(h)

The Task Force now has before it another proposed change to Rule 32.1(h), as follows:

“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 ~~the death penalty would not have been imposed~~ 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.”

Proposal to modify Rule 32.1(h), July 30, 2018 Memorandum from Lacey Gard (“Proposing Memo.”).

Solution:

The Court should not modify Rule 32.1(h) as proposed.

As an initial matter, this proposal does not simply “clarify[y] that Rule 32.1(h) is limited to circumstances in which a defendant is shown to be *ineligible* for the death penalty.” (See Proposing Memo at 2.) Instead, it would change and limit the current meaning of Rule 32.1(h).

Rule 32.1(h), by its plain language, asks whether “the death penalty would not have been imposed.” This necessarily requires weighing both aggravation and mitigation. See Ariz. Rev. Stat. § 13-751(E) (“In determining whether to impose a sentence of death . . . [t]he trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances . . . and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency.”).

At the August 3rd Task Force meeting, members noted that a prior committee on enacting this rule may not have intended to include the weighing of mitigation in Rule 32.1(h)’s inquiry into whether death would have been imposed. Regardless of the breadth of the committee’s discussions, however, the Arizona Supreme Court’s decision was made after considering multiple comments, and its ultimate choice is telling.

Among the comments submitted during the relevant amendment period, three specifically discussed including an innocence-of-the-death penalty provision.

(Attachment A, pp. 042-044, pp. 052, 055, pp. 063, 070-71.¹) Only one of those comments, authored by Gregory McCarthy, suggested a narrow provision based only on death eligibility (as the Proposing Memo now advocates). The Court rejected Mr. McCarthy’s proposed language. (Attachment A, p. 063, 070-071; Attachment A, p. 001-004.) Likewise, the case the Proposing Memo seeks to incorporate—*Sawyer v. Whitley*, 505 U.S. 33 (1992)—had been decided for years at the time of the amendment. The Court did not incorporate the *Sawyer* standard or language into the rule. After lengthy deliberations (more than five years from the creation of the PCR Committee), the Court adopted the amended Rule 32.1(h). (Attachment A, p. 001-004.)

Then, a year after the Court adopted Rule 32.1(h), the Arizona Attorney General’s Office attempted to narrow it to the precise interpretation suggested in the current Proposing Memo. (Attachment B, p. 120.) The Court rejected the proposed amendment. (Attachment B, p. 132.)

The Arizona Attorney General’s Office recently again proposed this narrowing construction in *State v. Miles*, and the Arizona Supreme Court expressly declined to address it. 243 Ariz. at 514, 414 P.3d at 683.

In sum, the plain meaning and history of Rule 32.1(h) indicate the Court’s intent to provide a framework for relief when death “would not have been imposed”—a finding which necessarily accounts for considering mitigation.

The question before the Task Force, then, is whether to propose narrowing Rule 32.1(h)—more specifically, whether to do away with relief in the limited circumstance that a defendant can prove by clear and convincing evidence that no reasonable fact-finder would have weighed the aggravation and mitigation and imposed a death sentence.

The Proposing Memo suggests making this change to “promote finality” and “reduce the risk of Rule 32.1(h) being used to circumvent” other finality rules. The change is not necessary for those ends.

Finality and the rights of victims are unquestionably important. But, the problems the Proposing Memo deem compelling have not materialized in the 18 years that have passed since the rule’s adoption. Data collected by the Arizona Capital Representation Project show that successive post-conviction petitions based on Rule

¹ The full dockets related to the rule change petitions (R-97-0006 and R-01-0015) total over 450 pages. For brevity, only select relevant petitions and comments are attached to this memo. Attachment A includes items from the R-97-0006 docket; Attachment B includes items from the R-01-0015 docket. All of the items are consecutively Bates numbered and this memo cites those numbers. An index of the docket items is also attached to this memo.

32.1(h) have been filed in less than five cases since the Court adopted the rule. And, only one of those cases has proceeded to an evidentiary hearing. Even attempted claims based on Rule 32.1(h) are rare, much less the use of the rule to grant relief. The courts are well equipped to quickly deny relief and hearings as necessary.

As the Proposing Memo points out, “It is difficult, if not impossible, to hypothesize some type of additional mitigation evidence . . . that would be so compelling that it could be said that no reasonable fact-finder would have imposed the death penalty had it considered additional mitigation.” (Proposing Memo at 1-2.) The standard is concededly lofty, and can be used with ease to shut out petitioners that cannot meet it.

On the other hand, evidence demonstrating that a defendant is clearly undeserving of the most severe punishment—death—should be given effect over the generalized interest in finality. In the very rare case that a defendant could present mitigation sufficient to meet this standard—again, that *no* reasonable fact-finder would have imposed death—there can be no compelling interest in executing that person. The Court’s adoption of this rule, which permits relief to death-sentenced prisoners where a “less severe penalty is deserved”² does not offend the principle of finality or victims’ rights. Rule 32.1(h) was designed to prevent an unjust execution, and removing the consideration of mitigation from that analysis would undermine its purpose.

For the same reasons, Rule 32.1(h) does not risk “swallowing” the finality requirements that apply to Rule 32.1(e). Rule 32.1(e) contemplates relief when material facts, discovered after trial and despite the exercise of diligence “probably would have changed the verdict or sentence.” Rule 32.1(h) evidence is a distinguishably narrower class of evidence. In a rare case, regardless of diligence and timeliness, some evidence might be later discovered that is so powerful it would show that no fact-finder would have imposed death. This is not simply any case of any “material” evidence, but a narrower set of evidence that meets the strict definitions of Rule 32.1(h). And, again, should the evidence meet that standard, there is no legitimate purpose to be served in executing the defendant, regardless of timeliness or preclusion.

The Proposing Memo also suggests that the rule’s current text, by including the consideration of mitigation, “improperly add[s] substantive rights beyond those proposed by the statute or the federal and state Constitutions.” (Proposing Memo. at 2.) The consideration of mitigation, however, is in fact an essential, constitutionally required aspect of sentencing a person to die. *E.g. Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (“[T]he fundamental respect for humanity underlying the Eighth

² See generally *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”). The consideration of mitigation is no less constitutionally significant than the finding of aggravating circumstances.³

The Court’s Authority over Rule 32

During the August 3rd Task Force meeting, Judge Cattani specifically asked that this memo include a discussion of whether the “death would not have been imposed” clause of Rule 32.1(h) violates the constitution’s separation-of-powers clause. Likewise, the Proposing Memo suggests that modifying Rule 32.1(h) would “shore up the Rule against a separation-of-powers challenge by cabining Rule 32.1(h) claims to those that arguably have a constitutional underpinning.” (Proposing Memo at 4.) Contrary to the Proposing Memo’s suggestion, *all* of Rule 32.1(h) is constitutionally based and does not violate the separation-of-powers clause.

First, as a simple matter, Rule 32.1(h) has been in effect since 2000. As far as our research can tell, within the 18 years since then, no court or other governmental body has indicated any separations-of-powers concern related to the existence of Rule 32.1(h).

Arizona’s Constitution explicitly grants the Arizona Supreme Court the exclusive authority to make procedural rules governing the courts. *See* Ariz. Const. art VI, § 5 (“The Supreme Court shall have: . . . Power to make rules relative to all procedural matters in any court.”). *See also State ex rel Napolitano v. Brown*, 194 Ariz. 340, 342 (1999); *State v. Bejarano*, 158 Ariz. 253, 254 (1988) (approving reasoning of *State v. Fowler*, 156 Ariz. 408, 411-412 (Ct. App. 1988)).

Rule 32, as whole, operates as procedural law—the clear province of the Court. Even where the line between procedural and substantive law is less clear, however, the grounds for relief provided in Rule 32.1 arise from statutory or constitutional rights, and Rule 32.1 provides the procedural framework for exercising those rights.

It is generally true that while the grounds for relief identified in Rule 32.1 follow Ariz. Rev. Stat. § 13-4231, *no* part of Rule 32.1(h) is found in the statute. While Rule 32.1(h) acknowledges grounds for relief that are not explicitly identified in § 13-4231, it creates a framework for obtaining relief on constitutionally based claims. The substantive rights protected—the right to be free from wrongful conviction and

³ The Proposing Memo also suggests that guilt and aggravation determinations are “factual question[s],” while the consideration and weighing of mitigation “is not.” (Proposing Memo at 4, 5.) Respectfully, all of these inquiries are “fact-based.” The idea that a mitigation determination may not rely on a set list of defined factors does not make it less fact-based or less crucial to the determination of whether death should be (or would have been) imposed.

execution—are both constitutional and do not conflict with Arizona’s statutory scheme. As described above, in capital cases, the consideration of mitigation has no less “constitutional underpinning” (see Proposing Memo at 4) than the other findings necessary to deciding whether to sentence a person to die. *E.g. Eddings*, 455 U.S. at 112.

For all of these reasons, as part of the Task Force’s focused work group, I would not recommend adopting the proposed changes to Rule 32.1(h).

INDEX TO FPD MEMO RE: RULE. 32.1(h)

Attachment A—Arizona Supreme Court No. R-97-0006

Bates	Dkt. No.	Description
001-035	28	10/31/2000, Arizona Supreme Court, Order (amending Rule 32)
036-041	27	11/1/2000, Arizona Supreme Court, Order (adopting modified version of second amended petition to amend Rule 32)
042-051	24	6/20/2000, Arizona Attorneys for Criminal Justice, Comment to Amended Petition to Amend Rule 32 of the Arizona Rules of Criminal Procedure
052-062	23	6/7/2000, Arizona Capital Representation Project, Comment to Second Amended Petition to Amend Rule 32 of the Arizona Rules of Criminal Procedure
063-072	17	5/24/2000, Gregory A. McCarthy, Comments on Second Amended Petition to Amend Rule 32 of the Arizona Rules of Criminal Procedure
073-118	9	2/3/2000, Second Amended Petition to Amend Rule 32 of the Arizona Rules of Criminal Procedure

Attachment B—Arizona Supreme Court No. R-01-0015

Bates	Dkt. No.	Description
119-131	1	9/7/2001, Arizona Attorney General, Petition to Amend Rules of Criminal Procedure
132	2	10/15/2001, Arizona Supreme Court, Order (denying proposal re: actual innocence provision)

Attachment A

(23)
R-97-0006
FILED
OCT 31 2000
NOEL K. DESSAINT
CLERK SUPREME COURT
BY *SJS*

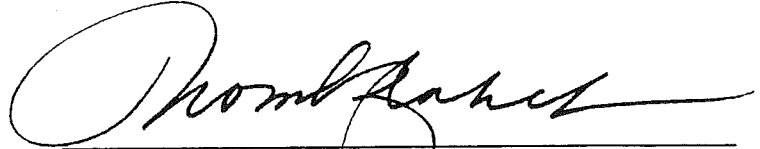
THE SUPREME COURT OF THE STATE OF ARIZONA

ORDER AMENDING RULE 32,
ARIZONA RULES OF CRIMINAL PROCEDURE

IT IS ORDERED amending Rule 32, Arizona Rules of Criminal Procedure, as set forth in the attachment hereto,* effective December 1, 2000. The attached amendments shall be applicable to all post-conviction relief proceedings filed or pending on or after December 1, 2000.

Dated in the City of Phoenix, Arizona
at the Arizona Courts Building, this
31st day of October, 2000.

For the Court:



THOMAS A.. ZLAKET, CHIEF JUSTICE

* Changes or additions in the text are indicated by underscoring; deletions from text are indicated by ~~strikeouts~~.

(23)

R-97-0006

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NOEL K. DESSAINT
CLERK SUPREME COURT
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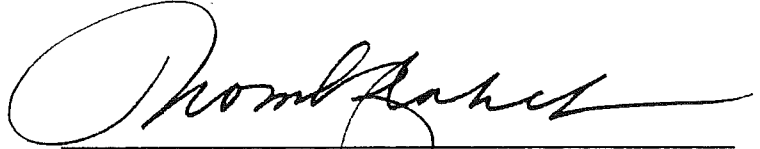
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RULE 32. OTHER POST-CONVICTION RELIEF

Rule 32.1 Scope of remedy

Subject to the limitations of Rule 32.2, 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~~ .

Any person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest shall have the right to file a post-conviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding.

Grounds for relief are:

- a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;
- b. The court was without jurisdiction to render judgment or to impose sentence;
- c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
- d. The person is being held in custody after the sentence imposed has expired;
- e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:

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

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

(3) 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.

f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal from the judgment, sentence, or both within the prescribed time was without fault on the defendant's part; or

g. There has been a significant change in the law that if determined to apply to 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 have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

Comment

Changes in the first and second paragraphs and in subsection (f) are to meet and accommodate the requirements of Montgomery v.

Sheldon, 181 Ariz. 256, 889 P.2d 614 (1995) (opinion supplemented, 182 Ariz. 118, 893 P.2d 1281), and its progeny. A petition when authorized under Montgomery is referred to in the above provision as an "of-right" proceeding. Relief pursuant to subsection (f) will continue to be unavailable to all post-conviction relief proceedings not "of-right". See Moreno v. Gonzalez, 192 Ariz. 131, 962 P.2d 205 (1998).

The addition of new subparagraph (h) is warranted by the U.S. Supreme Court's pronouncement that claims of actual innocence are not cognizable under the federal habeas corpus remedy. Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853 (1993). This claim is independent of a claim under subparagraph (e). A defendant who establishes a claim of newly discovered evidence does not need to comply with the requirements of subparagraph (h).

In approving the 2000 amendments to Rule 32, the Arizona Supreme Court did not have the benefit of the comments of a statewide commission which was empaneled that year by the Attorney General of Arizona to investigate and assess the administration of the death penalty in the State of Arizona. Accordingly, further amendments to Rule 32 may be necessary following the issuance of that commissions's recommendations. In particular, the topics of deadlines and time periods and victims' rights may need to be addressed at that time.

Rule 32.2. Preclusion of remedy.

a. **Preclusion.** A defendant shall be precluded from relief under this rule based upon any ground:

(1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;

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

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

b. **Exceptions.** Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), ~~and (g) and (h)~~. When a claim under Rules 32.1(d), (e), (f), ~~and (g) and (h)~~ is to be raised in a successive or untimely post-conviction relief proceeding, petition, the petition notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the petition notice shall be summarily dismissed.

c. **Standard of proof.** The state shall plead and prove any ground of preclusion by a preponderance of the evidence. Though the state has the burden to plead and prove grounds of preclusion, any court on review of the record may determine and

hold that an issue is precluded regardless of whether the state raises preclusion.

Comment

Amendments to subsection (b) intended to conform to recent statutory changes include a requirement that a defendant set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. The failure to identify the specific exception will allow for dismissal without prejudice on the notice alone. Additionally, the amendments add a claim of actual innocence as an exception to preclusion.

Subsection (c) is amended to conform to recent statutory changes.

Rule 32.3. Nature of proceeding and relation to other remedies.

This proceeding is part of the original criminal action and not a separate action. It displaces and incorporates all trial court post-trial remedies except post-trial motions and habeas corpus. If a defendant applies for a writ of habeas corpus in a trial court having jurisdiction of his or her person raising any claim attacking the validity of his or her conviction or sentence, that court shall under this rule transfer the cause to the court where the defendant was convicted or sentenced and the latter court

shall treat it as a petition for relief under this rule and the procedures of this rule shall govern.

Rule 32.4. Commencement of proceedings.

a. **Form, Filing and Service of Petition.** A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred. The court shall provide notice forms for commencement of ~~first and successive~~ all post-conviction relief proceedings. In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In ~~a~~ all other non-capital cases, the notice must be filed within ninety days ~~of~~ after the entry of judgment and sentence or within thirty days ~~of~~ after the issuance of the order and mandate affirming the judgment and sentence on in the direct appeal, whichever is the later. In a capital case, the clerk of the Supreme Court shall expeditiously file a notice for post-conviction relief with the trial court upon the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal. Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), ~~or~~ (g) or (h). The notice shall bear the caption of the original criminal action or actions to which it

pertains. On receipt of the notice, the court shall file a copy of the notice in the case file of each such original action and promptly send copies to the defendant, the county attorney, the defendant's attorney, if known, and the attorney general or the prosecutor, noting in the record the date and manner of sending the copies. If the conviction occurred in a court other than the Superior Court, the copy shall be sent to the office of the prosecuting attorney who represented the state at trial. The state shall notify ~~the~~ any victim who has ~~en~~ requested notice of post-conviction proceedings.

b. Notification of Appellate Court. If an appeal of the defendant's conviction, sentence, or both is pending, the clerk, or the court, within 5 days after the filing of the notice for post-conviction relief, shall send a copy of the notice to the appropriate appellate court, noting in the record the date and manner of sending the copies.

c. Appointment of Counsel.

(1) Capital Cases. Upon the filing of ~~a timely~~ the notice by the clerk of the Supreme Court in a capital case, the Supreme Court, or if authorized by the Supreme Court, the presiding judge of the county from which the case originated, shall appoint counsel for the defendant pursuant to A.R.S. § 13-4041 and Rule 6.8 if the defendant is determined to be indigent. If the appointment is made

by the presiding judge, a copy of the court's order appointing counsel shall be filed in the Supreme Court.

Upon the filing of a successive notice, the presiding judge shall appoint the previous post-conviction counsel of the capital defendant unless counsel is waived or good cause is shown to appoint another qualified attorney from the list described in A.R.S. § 13-4041.

On the first notice in capital cases, appointed counsel for the defendant shall have one hundred twenty days from the date of appointment to file a petition raising claims under Rule 32.1. A capital defendant proceeding without counsel shall have one hundred twenty days from the filing of the notice to file a petition. On the filing of a successive notice, appointed counsel, or the defendant if proceeding without counsel, shall file the petition within thirty days from the filing of the notice. On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. Additional extensions of thirty days may be granted for good cause. If a petition for post-conviction relief is not filed within one hundred and eighty days from the date of appointment of counsel, or one hundred and eighty days from the date the notice is filed, or the date a request for counsel is denied if the defendant is proceeding without counsel, the defendant or counsel for the defendant shall file a notice in the Supreme Court, advising the court of the

status of the proceedings. Thereafter, defendant or counsel for the defendant shall file monthly status reports in the Supreme Court until the post-conviction proceedings are concluded in the trial court.

(2) Rule 32 of-right and non-capital cases. Upon the filing of a timely or first notice in a Rule 32 proceeding, in a non-capital case, or the second or subsequent notice in a non-capital case which, for the first time, raises a claim of ineffective assistance of counsel, the presiding judge, or his or her designee, shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel in successive or untimely petitions is within the discretion of the presiding judge. In non-capital cases appointed counsel for the defendant shall have sixty days from the date of appointment to file a petition raising claims under Rule 32.1. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition. On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. Additional extensions of thirty days shall be granted only upon a showing of extraordinary circumstances.

In a Rule 32 of-right proceeding, counsel shall investigate the defendant's case for any and all colorable claims. If counsel

determines there are no colorable claims which can be raised on the defendant's behalf, counsel shall file a notice advising the court of this determination. Counsel's role is then limited to acting as advisory counsel until the trial court's final determination. Upon receipt of the notice, the court shall extend the time for filing a petition by the defendant in propria persona. The extension shall be 45 days from the date the notice is filed. Any extensions beyond the 45 days shall be granted only upon a showing of extraordinary circumstances.

~~A non-capital defendant proceeding without counsel shall have sixty days to file a petition from the date the notice is filed or from the date the request for counsel is denied. In capital cases, appointed counsel for the defendant shall have one hundred twenty days from the date of appointment to file a petition raising claims under Rule 32.1. A capital defendant proceeding without counsel shall have one hundred twenty days from the filing of the notice to file a petition. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition. On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. In non-capital cases, additional extensions of thirty days shall be granted only in extraordinary circumstances. In capital cases, additional extensions of thirty days may be granted for good cause.~~

d. **Transcript Preparation.** If the ~~record~~ transcripts of the trial court proceedings ~~has~~ have not been previously transcribed, the defendant may request on a form provided by the clerk of court that the ~~record~~ transcripts be prepared. The court shall expeditiously review the request and order only those portions of the record transcripts prepared that it deems necessary to resolve the issues to be raised in the petition. The preparation of the ~~record~~ transcripts shall be at county expense if the defendant is indigent. The time for filing of the petition shall be tolled from the time a request for ~~the record~~ transcripts is made until the ~~record is~~ transcripts are prepared or the request is denied. Transcripts shall be prepared and filed within sixty days of the order granting the request.

e. **Assignment of Judge.** The proceeding shall be assigned to the sentencing judge where possible. If it appears that the sentencing judge's testimony will be relevant, that judge shall transfer the case to another judge.

f. **Stay of Execution of Death Sentence; Notification by Supreme Court.** If the defendant has received a sentence of death and the Supreme Court has fixed the time for execution of the sentence, no stay of execution shall be granted upon the filing of a ~~second or subsequent~~ successive petition except upon separate application for a stay to the Supreme Court, setting forth with particularity those issues not precluded under Rule 32.2. The

Clerk of the Supreme Court shall notify the defendant, the Attorney General, and the Director of the State Department of Corrections of the granting of a stay.

Comment

Amendments to subsection (a) are to meet the requirements of Montgomery and State v. Pruett, 185 Ariz. 128, 912 P.2d 1357 (App. 1996). In Pruett, the court held that a pleading defendant is constitutionally entitled to effective assistance of counsel on the first petition for post-conviction relief, the counterpart to a direct appeal. Consequently, the rule is amended to allow the pleading defendant thirty days within which to file a second notice if the defendant seeks to challenge counsel's effectiveness in the Rule 32 of-right proceeding.

Amendments to subsection (c) are to separate capital from non-capital cases. Paragraph (1) brings the rule in line with new A.R.S. § 13-4041 and Rule 6.8 as adopted by the Supreme Court on October 22, 1996, effective November 1, 1996, which requires notification to the Supreme Court if a petition is not filed within 180 days from the filing of the notice for post-conviction relief, and requires monthly status reports thereafter.

Paragraph (2) requires appointment of counsel upon the timely filing of a first notice in a Rule 32 proceeding, when requested, but makes all other appointments of counsel in non-capital cases

discretionary. The paragraph adds language to permit counsel to comply with Lammie v. Barker, 185 Ariz. 263, 915 P.2d 662 (1996).

Subsection (d) is amended to substitute "transcripts" for "record", provides for expeditious review of a request for transcripts, allows the court to limit transcripts to those deemed necessary to resolve the issues to be raised, and prescribes a time limit for preparation of transcripts.

Rule 32.5. Contents of petition.

The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, and ~~verify under oath~~ certify that he or she has done so. Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required. In Rule 32 of-right and non-capital cases, the petition shall not exceed 25 pages. The response shall not exceed 25 pages, and any reply shall not exceed 10 pages. In capital cases, the petition shall not exceed 40 pages. The response shall not exceed 40 pages, and any reply shall not exceed 20 pages. An ~~incomplete~~ petition which fails to comply with this rule shall be

returned by the court to the defendant for ~~completion~~ revision with a minute entry specifying how the petition ~~is incomplete~~ fails to comply with the rule. ~~The~~ A petition that has been revised to comply with the rule shall be returned by the defendant for refiling within 30 days after defendant's receipt of the ~~incomplete non-complying~~ petition. If the petition is not so returned, the court shall dismiss the ~~petition~~ proceedings with prejudice. The period for response by the state shall begin on the date a returned petition is refiled.

Comment

The amendments prescribe page limitations for petitions for post-conviction relief in all cases. They provide that, where a defendant's non-complying petition has been returned to him and he has not refiled a petition which complies with the rules within 30 days, the court shall dismiss the proceedings with prejudice.

Rule 32.6. Additional pleadings; summary disposition; amendments

a. **Prosecutor's Response.** Forty-five days after the filing of the petition, the state shall file with the court and send to the defendant or counsel for the defendant, a response. Affidavits, records or other evidence available to the state contradicting the allegations of the petition shall be attached to it. On a showing of good cause, the state may be granted a thirty

day extension to file a response. Additional extensions shall be granted only ~~in~~ upon a showing of extraordinary circumstances.

b. **Defendant's Reply.** Within fifteen days after receipt of the response, the defendant may file a reply. Extensions shall be granted only ~~in~~ upon a showing of extraordinary circumstances.

c. **Summary Disposition.** The court shall review the petition within twenty days after the defendant's reply was due. On reviewing the petition, response, reply, files and records, and disregarding defects of form, the court shall identify all claims that are procedurally precluded under this rule. If the court, after identifying all precluded claims, determines that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed. If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law. If a hearing is ordered, the state shall notify the victims, upon the victims' request pursuant to statute or court rule relating to victims' rights, of the time and place of the hearing.

d. **Amendment of Pleadings.** After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

Comment

The amendments to subsections (a) and (b) clarify that the appropriate party must make a showing of extraordinary circumstances to be granted an extension of time to file pleadings. This does not preclude the court from reviewing the petition on its own initiative.

Rule 32.7. Informal conference.

The court may at any time hold an informal conference to expedite the proceeding. The defendant need not be present if the defendant is represented by counsel who is present.

Rule 32.8. Evidentiary hearing.

a. **Plenary Evidentiary Hearing.** The defendant shall be entitled to a hearing to determine issues of material fact, with the right to be present and to subpoena witnesses. If facilities are available, the court may, in its discretion, order the hearing to be held at the place where the defendant is confined, giving at least 15 days notice to the officer in charge of the confinement facility. In superior court, a complete record of the hearing shall be made.

b. **Evidence.** The rules of evidence applicable in criminal proceedings shall apply, except that the defendant may be called to testify at the hearing.

c. **Burden of Proof.** The defendant shall have the burden of proving the allegations of fact by a preponderance of the evidence. If a constitutional defect is proven, the state shall have the burden of proving that the defect was harmless beyond a reasonable doubt.

d. **Decision.** The court shall rule within 10 days after the hearing ends except in extraordinary circumstances where the volume of the evidence or the complexity of the issues require additional time. If the court finds in favor of the defendant, it shall enter an appropriate order with respect to the conviction, sentence or detention, any further proceedings, including a new trial and conditions of release, and other matters that may be necessary and proper: The court shall make specific findings of fact, and state expressly its conclusions of law relating to each issue presented.

e. Transcript. The court may, and shall upon request of a party within the time limit for filing a petition for review, order that a transcript of the evidentiary hearing be prepared. The preparation of the evidentiary hearing transcript shall be at county expense if the defendant is indigent.

Comment

The heading of subsection (a) is changed from "Plenary" to "Evidentiary."

Subsection (e) clarifies that a party is entitled to a transcript of any evidentiary hearing held pursuant to this rule

and that preparation of the transcript shall be at county expense if the defendant is indigent.

Rule 32.9 Review

a. **Motion for Rehearing; Response; Reply.** Any party aggrieved by a final decision of the trial court in these proceedings may, within fifteen days after the ruling of the court, move the court for a rehearing setting forth in detail the grounds wherein it is believed the court erred: No response to a motion for rehearing will be filed unless requested by the court, but a motion for rehearing will not be granted in the absence of such a response. ~~Any response shall be filed within fifteen days after service of such motion upon the adverse party.~~ A reply, if any, shall be filed within 10 days after the service of the response. The filing of a motion for rehearing in the trial court is not a prerequisite to the filing of a petition for review pursuant to paragraph (c) of this rule.

b. **Disposition When Motion Granted.** If the motion for rehearing is granted, the court may either (1) amend its previous ruling without a hearing, or (2) grant a new hearing and then either amend or reaffirm its previous ruling. In either case, if the court amends its previous ruling, it shall set forth its reasons for amending the previous ruling. The state shall notify the victim, upon request, of any action taken by the court.

c. **Petition for Review.** Within thirty days after the final decision of the trial court on the petition for post-conviction relief or the motion for rehearing, any party aggrieved may petition the appropriate appellate court for review of the actions of the trial court. A cross-petition for review may be filed within 15 days after service of a petition for review. The petition for review, cross-petition and all responsive pleadings filed pursuant to this rule shall be filed in the appellate court. Within 3 days after filing a petition or cross-petition for review, the petitioner and cross-petitioner, if any, shall file a notice of such filing with the trial court. The notice of filing may include a designation of record adding to the record defined in Rule 32.9(e) any additional transcripts of trial court proceedings that were prepared pursuant to Rule 32.4(d) or that were otherwise available to the trial court and the parties and that are material to the issues raised in the petition for review. Motions for extensions of time to file petitions or cross-petitions shall be filed in and ruled upon by the trial court. All other motions shall be filed in the court in which the petition is to be filed.

1. **Form and Contents.** The petition or cross-petition for review shall be typewritten in pica type and must be double-spaced. They shall be on paper 8.5 by 11 inches and contain a caption setting forth 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 side margins must be at least 1 inch, and the top and bottom margins must be at least 1 and 1/4 inch. The bottom margin shall be measured to the bottom of the text of footnote. Quotations may be single-spaced. The paper must be white, opaque, unglazed paper. An original and 6 copies of the petition and an original and one copy of the appendix, if any, shall be filed if review is being sought in the Supreme Court. An original and 4 copies of the petition and an original and one copy of the appendix, if any, shall be filed if review is being sought in the Court of Appeals. An original and one copy shall be filed if review of a petition filed in a limited jurisdiction court is being sought in the superior court. The parties shall be designated as in the trial court proceedings. The petition or cross-petition shall not exceed 20 pages, exclusive of the appendix, shall not have a cover or be bound, but shall be fastened with a single staple in the upper left corner, and shall contain concise statements of the following:

(i) ~~A synopsis of the trial court's ruling or rulings. Copies of the trial court's rulings entered pursuant to rules 32.6(c), 32.8(d) and 32.9(b) shall be attached to the petition or cross-petition.~~

(ii) The issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review.

(iii) The facts material to a consideration of the issues presented for review.

(iv) The reasons why the petition should be granted.

In capital cases All references to the record in the trial court shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices. If the appendices exclusive of the trial court's rulings exceed 15 pages in length, such appendices shall be fastened together separately from the petition and the copies of the trial court's rulings.

In Rule 32 of-right and non-capital cases, an appendix is not required, but the petition for review shall contain specific references to the record.

The filing of a motion for rehearing pursuant to paragraph (a) of this rule does not limit the issues that may be raised in the petition or the cross-petition for review. Failure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue.

2. Service; Response; Reply. The petitioner or cross-petitioner shall serve a copy of the petition or cross-petition on the adverse party. A response may be filed within 30 days from the date upon which the petition or

cross-petition is served. The response shall comply with the form requirements of Rule 32.9(c)(1) and shall not exceed 20 pages, exclusive of any appendix. Appendices shall conform to the requirements of Rule 32.9(c)(1). A reply, if any, may be filed within 10 days after the service of a response. The reply shall be limited to matters addressed in the response and shall not exceed 10 pages. No appendices shall be submitted with a reply.

d. **Stay Pending Review.** A motion for rehearing or a petition for review filed by the state pursuant to this section shall stay an order granting a new trial until final review is completed. For any other relief granted to a defendant, a stay pending further review is within the discretion of the trial or appellate court. The state shall notify the victim upon request of any action taken.

e. **Filing of the Record.** In Rule 32 of-right and non-capital cases, ~~Within 30 days after the expiration of the time for filing the last reply,~~ within 45 days after the receipt of the notice of filing of a petition for review, the record, including the trial court file, and the reporter's transcript, ~~and the original and all copies of the petition and cross-petition for review, responses and replies,~~ shall be transmitted to the appellate court.

In capital cases, the record of the post-conviction proceedings shall not be transmitted to the appellate court unless requested by that court. If requested by the appellate court, the record shall consist of copies of the notice of post-conviction

relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings filed and all minute entry orders issued in the post-conviction proceedings, plus the reporter's transcript and any exhibits admitted by the trial court in the post-conviction proceedings.

f. **Disposition When Petition Granted.** The Appellate Court may, in its discretion, grant review and may order oral argument upon the petition if deemed necessary and may issue such orders and grant such relief as it deems necessary and proper. The state shall notify the victim, upon request, of any action taken by the appellate court.

g. **Reconsideration and Review of Appellate Court Decision.** The provisions governing the filing of motions for reconsideration and petitions for review in criminal appeals set forth in Rules 31.18 and 31.19 shall apply to and govern motions for reconsideration and petitions for review of an appellate court decision entered pursuant to Rule 32.

h. **Return of the Record.** In Rule 32 of-right-and non-capital cases, when the matter is determined, the clerk of the appellate court shall return the record to the appropriate trial court for retention according to law. In capital cases, the clerk of the appellate court shall return any exhibits to the appropriate trial court.

Comment

Subsection (a) is amended to provide that no response to a motion for rehearing is to be filed unless requested by the court.

Subsection (c) changes the place of filing a petition for review to the appropriate appellate court and requires the petitioner to file a notice of such filing with the superior court. It allows the trial court to rule on motions for extensions of time for filing, but prescribes that the appellate court will rule on motions for additional pagination. This procedure is deemed advisable to achieve uniformity - some trial judges grant additional pagination, some do not - without burdening the appellate court with motions for extension of time better decided by the trial courts, e.g., extension may be necessary due to lack of transcripts from that judge's court.

Paragraph (1) changes the form of caption to the appellate court because the petition for review will be filed in that court. It provides that petitions for review are not to have covers or bindings.

Subparagraph (i) eliminates the need for a synopsis of the trial court's rulings.

Subsection (c) also removes the requirement for appendices in non-capital cases.

Subsection (e) retains the requirement for filing the record in non-capital cases, but provides that the record is not to be

transmitted in capital cases unless requested by the appellate court. This differs from non-capital cases because the record in capital cases remains in the Arizona Supreme Court. In non-capital cases, the record is returned to the trial court, as set forth in subparagraph (h).

Subsection (h) provides for different procedures for returning the record in capital and non-capital cases.

Form 24(c). (Amended) Notice Of Post-conviction Relief

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF _____

STATE OF ARIZONA,)
)
 Plaintiff,)
)
 v.)
)
 _____,)
)
 Defendant.)
 _____)

No. CR-_____

NOTICE OF POST-CONVICTION
RELIEF

Instructions: When the notice is complete, file it with the clerk of the superior court of the county in which the conviction occurred.

A person unable to pay costs of this proceeding and to obtain the services of a lawyer without substantial personal or family hardship should indicate this by requesting counsel in Question 6 of this notice and execute the AFFIDAVIT OF INDIGENCY on page 3. In the event an attorney is not appointed, a Request for Preparation of Post-Conviction Relief Record form must be filed by the defendant if some portion of the record is needed and has not previously been obtained.

NO ISSUE WHICH HAS ALREADY BEEN RAISED AND DECIDED ON APPEAL OR IN A PREVIOUS PETITION FOR POST-CONVICTION RELIEF MAY BE USED AS A BASIS FOR A SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF.

1. Defendant's Name and prison number (if any): _____

2. Defendant's address: _____

3. (A) Defendant was convicted of the following crimes: _____

(B) Defendant was sentenced on _____, 19____, to a term of _____, commencing on _____, 19____, following a

~~[] Trial by Jury [] Trial by a Judge without a Jury~~

Trial by: Jury Judge without a Jury
 ~~Plea of Guilty Plea of No Contest~~
Plea of: Guilty No Contest
Probation Revocation: Admission Violation Hearing

in the Superior Court of _____ County with
Judge _____ presiding.

(C) The file number of the case was CR-_____.

4. Defendant has taken the following actions to secure relief from his convictions or sentences:

(A) Direct Appeal: Yes No

(B) Previous Rule 32 Proceedings: Yes No

5. Defendant was represented by the following lawyers' at:
(provide name of counsel and counsel's address, if known)

Trial or change of plea: _____

Sentencing hearing: _____

Appeal (if any): _____

Previous Rule 32 proceedings (if any): _____

6. Defendant is presently represented by a lawyer. Yes No
(If yes, provide name and address.)

If no, does the defendant request the court to appoint a lawyer for this proceeding? Yes No.

7. Respond to this section only if this is an untimely notice or the defendant ~~requests counsel and~~ has filed a previous Rule 32 petition in this case.

I AM REQUESTING POST-CONVICTION RELIEF. I UNDERSTAND THAT I MUST INCLUDE IN MY PETITION EVERY GROUND FOR RELIEF WHICH IS KNOWN AND WHICH HAS NOT BEEN RAISED AND DECIDED PREVIOUSLY. I ALSO UNDERSTAND THAT FAILURE TO RAISE ANY KNOWN GROUND FOR RELIEF IN MY PETITION WILL PROHIBIT ME FROM RAISING IT AT ANY FUTURE DATE.

Date

Defendant

AFFIDAVIT OF INDIGENCY

I have requested the appointment of a lawyer to represent me in Question 6. I swear under oath and penalty of perjury that I am indigent and because of my poverty I am financially unable to pay for the cost of a lawyer to represent me without incurring substantial hardship to myself or my family.

Defendant

Subscribed and sworn to before me on _____
(date)

My Commission Expires

Notary Public

RULE 28 FINAL RULE DISTRIBUTION LIST
for R-97-0006
DESIGNATED BY RULE 28

TO:

Petitioner

Hon. Jane D. Hull, Governor, State of Arizona

Hon. Jeffrey S. Groscost, Speaker, Arizona House of Representatives

Hon. Brenda Burns, President, Arizona State Senate

Hon. Janet A. Napolitano, Attorney General, State of Arizona

Michael E. Braun, Executive Director, Arizona Legislative Council

Patricia White, Dean, Arizona State University, College of Law

Toni M. Massaro, Dean, University of Arizona, College of Law

Dave Byers, Admin Director, Administrative Office of the Courts

Glen D. Clark, Clerk, Court of Appeals, Division One

Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two

Executive Director, State Bar of Arizona

Hon. Sherry L. Geisler, President, Justice of the Peace Assoc

Hon. Tom C. Cole, President, Arizona Judges Assn

Patricia Horgan, Exec Dir, Arizona Attorneys for Criminal Justice

Edwin M. Cook, Exec Dir, AZ Prosecuting Atty's Advisory Council

Sue Hall, President, Superior Court Clerk's Association

Janice Goldstein, Executive Director, Arizona Trial Lawyers Association

Thomas P. Burke II, President, Arizona Assn of Defense Counsel

Judy A. Ferguson, President, Arizona Magistrates Association

Laura V. MacBan, President, Tucson Defense Bar Association

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Editor, The Writ

COURT OF APPEALS PRESIDING JUDGES:

Hon. E.G. Noyes, Chief Judge, Court of Appeals, Div One

Hon. Philip G. Espinosa, Chief Judge, Court of Appeals, Div Two

SUPERIOR COURT PRESIDING JUDGES:

Apache County

Cochise County

Coconino County

Gila County

Graham County

Greenlee County

La Paz County

Maricopa County

Mohave County

Navajo County

Pima County

Pinal County

Santa Cruz

Yavapai County

Yuma County

BAR ASSOCIATION PRESIDENT:

Apache County - Bryce Patterson
Cochise County - Patricia Mulqueen
Coconino County - David Rozema
Gila County - Jefferson R. Dalton
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Maricopa County - Thomas Toone
Mohave County - Dolores H. Milkie
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Santa Cruz County - Saji Vettiyl
Yavapai County - David Wilson
Yuma County - Jon R. Smith
East Valley - Robert Weber
Scottsdale - Christine Pesticci
West Maricopa - Catherine Leas

COUNTY PUBLIC DEFENDERS DESIGNATED BY THE COURT:

Cochise County - Mark A. Suagee
Coconino County - H. Allen Gerhardt
La Paz County - Michael J. Burke
Maricopa County - Dean W. Trebesch
Mohave County - Kenneth D. Everett
Navajo County - Myrna Parker
Pima County - Susan A. Kettlewell
Pinal County - Michael F. Beers
City of Phoenix - Gary Kula
Yuma County - Ronald F. Jones

LEGAL DEFENDERS DESIGNATED BY THE COURT:

Cochise County - James G. White
Maricopa County - Robert S. Briney
Maricopa County Office of Court Appointed Counsel - John W. Rood III
Mohave County - Larry S. Rosenthal
Navajo County Alternative Defender - Dale P. Nielson
Pima County - Isabel Garcia de Romo

OTHERS

COUNTY ATTORNEYS:

Apache County - Stephen G. Udall
Cochise County - Alan K. Polley
Coconino County - Terence C. Hance
Gila County - Jerry B. DeRose
Graham County - Jack M. Williams
Greenlee County - Dennis L. Lusk
La Paz County - Steven P. Suskin
Maricopa County - Richard M. Romley
Mohave County - William J. Ekstrom, Jr.
Navajo County - Melvin R. Bowers, Jr.
Pima County - Barbara LaWall
Pinal County - Robert Carter Olson
Santa Cruz County - Martha S. Chase
Yavapai County - Charles R. Hastings
Yuma County - David S. Ellsworth

SUPERIOR COURT CLERKS:

Apache County - Sue Hall
Cochise County - Denise Lundin
Coconino County - Julie Carlson
Gila County - Margaret Toot
Graham County - Amelia Sainz
Greenlee County - Cheryl Bowen
La Paz County - Sheri Newman
Maricopa County - Michael Jeanes
Mohave County - Virlynn Tinnell
Navajo County - Juanita Mann
Pima County - Patricia Noland
Pinal County - Alma Jennings Haught
Santa Cruz County - Delfina Bauch
Yavapai County - Norbert Wedepohl
Yuma County - Beverly Frame

COURT ADMINISTRATORS:

Cochise County - Karen D. Ferrara
Coconino County - Gary Krcmarik
Gila County - Mary Hawkins
Graham County - Kristy Ferguson
La Paz County - Richard Tozer
Maricopa County - Gordon Griller
Mohave County - Rick Lewis
Navajo County - Wayne Eiting
Pima County - Don Stiles
Pinal County - John Woods
Santa Cruz County - Frank Corrales
Yavapai County - Deborah Schaefer
Yuma County Court -

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Greenlee County
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Maricopa County
Maricopa County-Southeast Branch
Mohave County
Navajo County
Pima County
Pinal County
Santa Cruz County
Yavapai County
Yuma County
Arizona State University
University of Arizona

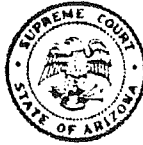
SPECIFIC INDIVIDUALS DESIGNATED BY THE COURT:

Carolyne K. Bass, Executive Director, Pima County Bar Association
Tom R. Clark, Regional Chairman, American Bd of Trial Advocates
Scott Bales, Solicitor General, Arizona Attorney General's Office
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Shirley Wahl, Chair, Civil Practice & Procedure Committee
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Supreme Court

STATE OF ARIZONA

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KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

TELEPHONE: (602) 542-9396

November 1, 2000

RE: In the Matter of RULE 32, ARIZONA RULES OF CRIMINAL PROCEDURE
Supreme Court No. R-97-0006

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 31, 2000, in regard to the above-referenced cause:

ORDERED: Second Amended Petition to Amend Rule 32 of the Arizona Rules of Criminal Procedure = ADOPTED as modified.

NOEL K. DESSAINT, Clerk

TO:

Ronald S. Reinstein, Associate Presiding Judge, Maricopa County
Superior Court

William J. Kirchner, Esq., Law Offices of Walter B. Nash

Allen B. Shayo, Esq., Assistant Executive Director-Legal, State Bar
of Arizona

Marcia S. Lindley, Esq., Supervising Staff Attorney, Court of
Appeals, Division Two

Steven J. Twist, Esq., Assistant General Counsel, VIAD Corp.

Janet A. Napolitano, Esq., Arizona Attorney General, Arizona
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Gregory A. McCarthy, Esq., Assistant Arizona Attorney General,
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Susan A. Kettlewell, Esq., Pima County Public Defender
Nancy F. Jones, Esq., Deputy Pima County Public Defender
Joy Athena, Esq., Pima County Legal Defender
Robb P. Holmes, Esq., Deputy Pima County Legal Defender
Gail Gianasi Natale, Esq.
Mark A. Suagee, Esq., Cochise County Public Defender
Bret H. Huggins, Esq., Deputy Pinal County Public Defender
Julie S. Hall, Esq., Arizona Capital Representation Project
Martin Lieberman, Esq., Martin Lieberman P.C.

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Hon. Brenda Burns, President, Arizona State Senate

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Maricopa County - Robert S. Briney
Maricopa County Office of Court Appointed Counsel - John W. Rood III
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Navajo County Alternative Defender - Dale P. Nielson
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Scott Bales, Solicitor General, Arizona Attorney General's Office
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Shirley Wahl, Chair, Civil Practice & Procedure Committee
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ARIZONA ATTORNEYS FOR
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Phoenix, Arizona 85014
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NOEL K. DESSAINT
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IN THE SUPREME COURT OF ARIZONA

In the Matter of:) Supreme Court No. R-97-0006
)
RULE 32, ARIZONA RULES) Comment to Amended Petition to Amend Rule
OF CRIMINAL PROCEDURE) 32 of the Arizona Rules of Criminal Procedure
)

The Arizona Attorneys for Criminal Justice (AACJ) is a state wide organization of criminal defense lawyers with close to 600 members. The organization was formed in 1986 by a small group of lawyers and has grown twelve fold since that time. The organization is dedicated to the maintenance of the highest professional standards, continuing education of criminal defense attorneys, and the protection and promotion of the criminal justice system. AACJ participates in legislative projects and works both within and without the Court system to ensure that the rights of the accused are fairly considered in all stages of the process.

AACJ formed a special committee to review the proposed rules changes. The committee was comprised of lawyers who specialize in both capital and non-capital litigation as well as lawyers who maintain a general criminal practice. As a result of the cumulative experience of the committee members in state post conviction relief proceedings,

1 we are in an excellent position to submit the following comments to the proposed amended
2 rule changes.

3 **I. RULE 32.2 (b): PROVIDING A GROUND OF RELIEF FOR ACTUAL**
4 **INNOCENCE**

5 We agree that there should be a ground for relief for actual innocence, that it should
6 be placed under Rule 32.1, and that it should be referenced under Rule 32.2 (b) as an
7 exception to the preclusion rules. However, this ground for relief should not include the
8 requirement for showing a constitutional violation. The conviction and punishment of an
9 innocent person after a fair trial is no less reprehensible than the conviction and punishment
10 of an innocent person after an unfair trial. Moreover, the conviction and punishment of an
11 innocent person is a violation of the Eighth Amendment in its own right.

12 We agree with the subcommittee report that the present ground for newly discovered
13 evidence should remain as it is and that the new ground for actual innocence should be
14 added to the list of available grounds. The rationale for adding a new ground for actual
15 innocence is that this ground is focused on the accuracy of the verdict in light of the new
16 evidence, whereas the newly discovered evidence rule is focused on the fairness of the trial
17 in light of the new evidence.

18 We feel very strongly that the burden of proof placed on the defendant for showing
19 actual innocence should be that it is more probable than not that no reasonable fact finder
20 would have found guilt in light of the new evidence as is set forth in *Murray v. Carrier*, 477
21 U.S. 478, 496 (1986). Under this standard the burden is placed on the already convicted
22 defendant, but still guards against the punishment of an innocent individual. The more
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1 stringent standard set forth in *Sawyer v. Whitley*, 505 U. S. 333, 348 (1992), that a defendant
2 must show by clear and convincing evidence that no reasonable fact finder would have
3 found guilt in light of the new evidence, is too restrictive to assure that innocent individuals
4 are not being unfairly punished.
5

6 We also feel very strongly that it is crucial to include innocence of the death penalty
7 in this exception. This would include new evidence, which either limits aggravation or
8 expands mitigation. The new evidence should be significant enough to demonstrate that the
9 decision to impose the death penalty was clearly erroneous.
10

11 Since the Arizona Supreme Court has decided to no longer perform proportionality
12 reviews, *State v. Salazar*, 173 Ariz. 399, 844 P.2d 566, (1992), the addition of innocence of
13 the death penalty in this exception would help to assure fairness in imposing death at the
14 state level. Additionally, if mental retardation, mental illness or brain damage is not
15 discovered until a successor PCR there would be no relief available if the trial court could
16 not consider innocence of the death penalty. Similarly, in a case where a prior conviction
17 is used as an aggravator and then, subsequent to the imposition of the death penalty and after
18 the first PCR has been concluded, the prior conviction is overturned, relief would not be
19 available if the trial court could not consider innocence of the death penalty.
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1 **II. CAPITAL CASES**

2 A. RULE 32.4 (c) (1)

3 1. Appointment of counsel in capital cases

4 We agree that there should be an automatic appointment of counsel in capital cases
5 once the notice is filed in the first and in successor PCR's. We also strongly encourage that
6 counsel should be held to the competency requirements set forth in *Strickland v.*
7 *Washington*, 466 U.S. 668 (1984).
8

9 2. Who may be appointed on successive capital petitions

10 Prior PCR counsel should not be automatically appointed or given preference in
11 capital successor petitions. Rather preference should be given to the defense counsel who
12 handled the federal habeas proceedings if possible. If such defense counsel is not on the
13 Arizona Supreme Court's list, they should not be automatically precluded from consideration
14 for the appointment in the successor. In the majority of the cases the federal habeas
15 attorneys would have reviewed the entire record, identified issues, and performed additional
16 investigation, which would have to be re-performed if new counsel is appointed at this stage.
17 Allowing for the federal habeas counsel to remain on the case, when possible, would be
18 economical, practicable, and in most cases, best for the defendant.
19

20 3. Filing deadlines in capital cases

21 The 120-day deadline from date of appointment of counsel for filing the first PCR
22 in a capital case is appropriate if the first extension request will be granted for good cause
23 and successive requests will be granted upon a showing of extraordinary circumstances.
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1 The 30-day deadline from the date of appointment for filing a successive petition in
2 a capital case is too short, especially if new counsel is assigned. Review of the record alone
3 may take hours let alone identifying potential issues and performing necessary investigation.
4 This would be an extreme hardship on newly appointed counsel. Therefore, we suggest a 60-
5 day deadline in these cases as long as extensions will be granted upon the showing of good
6 cause.
7

8 4. Extensions for filing petitions in capital cases
9

10 The 60-day extension and thereafter 30-days for good cause seems reasonable.

11 5. Filing status reports to Supreme Court for delayed capital petitions.
12

13 AACJ has no opinion regarding this additional requirement.

14 B. RULE 32.5: Length of capital petition
15

16 We believe that there should be no limitation on a capital petition for post conviction
17 relief. The 40-page limit is too restrictive in light of the fact that every known colorable
18 claim must be raised. A petition for post conviction is the first opportunity to challenge
19 errors made, challenge constitutional violations which were not apparent in the record before
20 the Arizona Supreme Court in the direct appeal, and to raise ineffective assistance of counsel
21 at trial, at sentencing, and on appeal.

22 Not only do the claims have to be raised, but also the underlying facts supporting
23 them must be set forth. If the law and facts are not clearly set forth they will not be held to
24 be exhausted for the purposes of federal habeas review. This requirement is extremely
25 cumbersome when alleging IAC claims. It is not enough to merely raise an allegation of
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1 IAC and present a few examples. In order to be exhausted for federal review every act, or
2 omission, or error needs to be set forth specifically in the petition for post conviction or the
3 defendant may be precluded from raising it in federal court.

4
5 Even claims that have been addressed by the United States Supreme Court need to
6 be preserved. For example, within the last year the United States Supreme Court has
7 indicated that the issue of judge sentencing should be revisited. *Jones v. United States*, 119
8 S. Ct. 1215 (1999). If a defendant had not raised this issue either during the direct appeal or
9 on the petition for post conviction relief he may not be able to benefit from a change in the
10 law.

11
12 As defense lawyers we are fully aware of the necessity to winnow issues and to raise
13 only the issues that are beneficial to our clients. *State v. Atwood*, 171 Ariz. 576, 832 P.2d
14 593 (1992). Therefore, this very limiting restriction is not necessary. However, if a page
15 limitation is added, we respectfully urge that upon a showing of good cause that extra pages
16 be allowed by the courts.

17
18
19 C. RULE 32.9 (e): Filing of record when petition for review is filed in a capital case.

20 We have grave concerns regarding the suggestion that the record not be transmitted
21 until the Arizona Supreme Court requests it. This is not the rule in non-capital cases. There
22 is no apparent justification to distinguish between capital and non-capital cases in this area.
23 The decision to grant or deny a petition for review should be based on the entire record. The
24 record should be available if a Justice desires to verify a part of the record or to more
25 extensively consider an issue.
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C. RULE 32.6: filing deadlines in PCRs of right

We do not object to the suggested deadlines as long as it is clear that a first request for an extension should be freely given for good cause and not the more stringent extraordinary circumstances.

D. RULE 32.4 (c) (2): appointment of counsel in PCRs of right

We have no objection to the timing of the appointments. However, the right to counsel should apply to all first petitions and to petitions raising IAC for the first time. Additionally counsel should be required to be competent under *Strickland v. Washington*, 466 U.S. 668 (1984). Competent counsel should not be limited to first petitions filed in “of right” cases. *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995).

IAC is strongly encouraged to be raised in the PCR. *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992). Additionally, all claims must be raised or face preclusion arguments in successor petitions, except for a few exceptions. Inmates do not have access to materials to research and litigate these claims and issues. Additionally, a defendant's federal review is directly controlled by the state litigation. Without the requirement of competent counsel at the PCR, defendants are being denied access to the courts, which could result in a denial of due process under the United States Constitution.

E. RULE 32.4 (c) (2): filing deadlines and extensions

Again, we do not object to these amendments as long as it is clear that first requests for extensions should be granted for good cause.

1 **IV. OTHER PROPOSALS**

2 A. RULE 32.2 (b): Pleading the asserted preclusion exception

3 We strongly object to this amendment. An attorney is not even appointed until 15
4 days after the filing of the Notice. This requirement would undermine the appointment of
5 counsel since preclusion issues not argued in the notice would be dismissed. The Notice
6 should remain only a form to initiate the PCR process and not be a primary pleading.
7

8 If this is adopted, the dismissal should be without prejudice or grant counsel time to
9 amend the Notice after counsel's appointment.
10

11 B. RULE 32.2 (c): Sua Sponte preclusion

12 We strongly object to this amendment being adopted. This provides no opportunity
13 for defense counsel to litigate or object to preclusion. Additionally, prosecutors may have
14 valid strategic reasons for not wanting an issue to be procedurally barred but rather heard
15 on the merits. For example, an issue that could be procedurally barred in a case may affect
16 several cases or be of statewide importance. A prosecutor may want to litigate the issue now
17 rather than wait for the issue to come up in another case in the future.
18

19 C. RULE 32.4 (d): Preparation of trial transcripts

20 The present rule provides that a court can limit transcript preparation to those
21 transcripts deemed necessary to resolve the issues. The proposed change makes this
22 wording more mandatory by inserting the word 'only.'
23

24 This change, on its face, appears to make a bad situation worse. Rule 32 issues
25 cannot be determined until after a complete review of the transcripts, conferencing with the
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1 client, reviewing discovery, and, possibly, completing additional investigation. Even in a
2 change of plea, the change of plea and the sentencing transcripts must be reviewed prior to
3 knowing whether issues exist. Thus, ordering the transcripts should be automatic and
4 mandatory.
5

6 We submit that this rule should be amended to provide for the copying of documents
7 that are always needed to handle a Rule 32. Besides the transcripts, the PCR record should
8 include the indictment, all motions filed, all minute entries where there was a court
9 appearance, the plea agreement, the presentence report, and Rule 32 notice. This should be
10 similar to the record on appeal, which is automatically prepared in all appeals. If additional
11 records are needed than the defense attorney could request the preparation of the additional
12 records.
13

14
15 D. RULE 32.5: Length of briefs

16 Because of the requirements that all issues must be raised or potentially be precluded
17 from consideration the courts should be advised that for good cause oversize briefs, if the
18 pages are limited, should be accepted.
19

20 E. RULE 32.5: Verification of petition

21 We recommend that the request to drop the verification requirement be adopted. It
22 is sometimes a handicap because of the time it takes to obtain certifications from inmates
23 housed in the Department of Corrections.
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F. RULE 32.9 (c): Extensions for petition for review and other motions

The committee recommends that extensions for filing a petition for review and other motions should be filed in the appellate courts.

RESPECTFULLY SUBMITTED THIS 20 DAY OF JUNE 2000.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE

By: Marty L.
Marty Lieberman, President 7442
3737 North Seventh Street, Suite 105
Phoenix, Arizona 85014

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COPY delivered this 20 day of
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HON. RONALD S. REINSTEIN
Chair, Postconviction Relief Committee
Maricopa County Superior Court
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Phoenix, Ariz. 85003

By: [Signature]

23
by

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IN THE SUPREME COURT OF ARIZONA

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In the Matter of:)	Supreme Court No. R-97-0006
)	
RULE 32, ARIZONA RULES)	Comment to Second Amended
OF CRIMINAL PROCEDURE.)	Petition to Amend Rule 32 of the
_____)	Arizona Rules of Criminal Procedure

The Arizona Capital Representation Project is a nonprofit death penalty resource center committed to assisting in the provision of competent representation to inmates sentenced to death and to defendants facing a possible sentence of death in the State of Arizona. Established in 1989, the Project has provided direct representation to dozens of capital prisoners and consulted and assisted in the cases of hundreds of others, many in state postconviction proceedings. In addition, the Project produced the Arizona Capital Case Defense Manual and Supplement and provides training to attorneys throughout the state who

represent capital defendants, including those in state postconviction proceedings. As a result, of this extensive work, the Project is intrinsically familiar with the procedural standards necessary to quality representation and fair proceedings in capital cases and so provides the following comments regarding the proposed changes to Rule 32:

Claims of Actual Innocence

The Postconviction Relief Committee ("Committee") proposes an additional exception to the rules of preclusion found in Rule 32.2(b). This new exception allows prisoners to file a second or successive postconviction petition where he or she can "show[] that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense." Second Amended Petition, Appendix A, at 3. This language mirrors the exception for filing a second or successive petition for writ of habeas corpus in 28 U.S.C. § 2244(b)(2)(B). It is beyond dispute that state law should provide a mechanism for relief to innocent persons convicted of a crime. The particular standard suggested by the Committee, however, is inappropriate for several reasons.¹

First, federal courts are constrained by concerns of comity. In addition to granting relief in cases where the federal constitution has been violated, federal courts must respect the judicial proceedings of the state which entered the judgment and sentence. In state court, of

¹Presumably an oversight, the amendment fails to insert this preclusion exception as a ground for relief under Rule 32.1. The Project advocates, and assumes the Committee would agree, that an innocent person should not be forced to wait until a second or successive petition to assert his or her innocence.

course, there is no court to which deference need be afforded. In state postconviction, courts review their own judgments and, particularly where an innocent person has been convicted, they should take an active role in ensuring that justice is achieved. In fact, an exception which shows that Arizona is not willing to kill those who are probably innocent will make the state courts more deserving of the respect they wish to be given by federal courts.

Second, the proposed standard requires that, in addition to proving his or her innocence, the innocent person must show that some other constitutional violation occurred at the trial or on appeal. The conviction and punishment of an innocent person is no less acceptable when done as a result of a trial and appeal which pass constitutional muster. This additional requirement serves no legitimate purpose, unless one believes that convicting and executing an innocent person after a fair trial is somehow less reprehensible than convicting and executing an innocent person after an unfair trial. In addition, the Project believes that, although federal and state law are not yet clear on this point, the conviction and execution of an innocent person is a constitutional violation. As a result, the innocence ground for relief and preclusion exception should not be amended to include this requirement.

Around the country, prisoners are being regularly freed from death rows after proving their innocence, often through the use of DNA evidence. It is nearly beyond question that innocent men and women have been executed, many such cases have been documented. For the hundreds or thousands of cases in which no DNA evidence is available, the risk of executing the innocent increases, and will continue in spite of advances in the testing of scientific evidence. In light of the serious and irrevocable nature of the execution of an

innocent person, the Project advocates the following standard for a showing of actual innocence, at least in capital cases: the petitioner must show that it is more probable than not that no reasonable fact-finder would have found guilt in light of the new evidence. See Murray v. Carrier, 477 U.S. 478, 496 (1986). This places the burden of proof on the already-convicted defendant, but balances the scales in such a way as to help guard against the most-grave error of the execution of an innocent person.

In addition, it is critical to include in this exception relief for those actually innocent of the death penalty. In other words, that the defendant should not be executed due either to the non-existence of aggravating factors or to the existence of mitigating factors which substantially outweigh any aggravating factors. This has been referred to as "the dangers of executing the guilty," and is a very serious problem indeed.

The ultimate punishment is reserved for relatively very few cases. Nationwide, only about one percent of murder defendants receive the death penalty. Studies have shown over and over again that--in spite of the efforts of sentencers, reviewing courts, and the written law--the cases in which death is imposed cannot be distinguished based upon their facts or the character of the defendant. In reality, the only factor which seems to play a role in determining who dies is the race of the victim.

An amendment which permits a postconviction court to fully consider the appropriateness of the death penalty can only contribute to the fairness in imposing the sentence. One example would be a case in which a defendant's serious mental retardation, brain damage, and mental illness are not discovered until a successive postconviction

petition. If this evidence leads the state postconviction court to conclude that the death sentence was inappropriate in the case, the court would have no procedural mechanism for granting relief. As a result, a man who is undeserving of the ultimate punishment would face execution.

Another example is the case in which an aggravating factor supported by a prior conviction is found to exist. If, after the first state postconviction petition, the prior conviction is found to be invalid so that the defendant was never eligible for a sentence of death, she may have no vehicle for obtaining relief from her sentence. Thus, a woman who could not lawfully be sentenced to death will be executed.

An amendment providing for consideration of innocence of the death penalty contributes to the overall fairness of the rules, and is a logical parallel to the closely-related “newly discovered evidence” exception which provides relief based on newly discovered evidence that applies to the “*verdict or sentence*” (emphasis added). Ensuring the correctness of the sentence is one of the most important tasks of courts in death penalty cases. Providing an opportunity to correct mistakes and prevent miscarriages of justice in capital sentencings is a benefit to the entire system.

Sua Sponte Findings of Preclusion

The proposed amendment to Rule 32.2(c) allows the postconviction court to find preclusion even where the state has failed to assert it. There is no indication that the State of Arizona fails to plead preclusion where appropriate. In fact, in federal court the state adamantly maintains that the preclusion rules are regularly and consistently applied in state

court. More importantly, the proposed amendment allows a court to assert preclusion in cases in which the state wishes to waive preclusion and allow an issue to be heard on the merits. This could occur in a case where the state believes, although potentially precluded, the failure to decide an issue will result in a miscarriage of justice. The state's ability to waive preclusion serves an important function in maintaining the integrity of the criminal justice system.

Appointment of Counsel

The Project is concerned about the proposed amendment to Rule 32.4(c) to appoint previous postconviction counsel or another lawyer from the Supreme Court's list upon the filing of a successive notice of postconviction relief. Second Amended Petition, Appendix A, at 7. Typically, the successive postconviction petition is filed after federal habeas corpus proceedings have been initiated and the habeas lawyer has reviewed the entire file, conducted substantial investigation, and prepared a federal petition.

The filing of a successive postconviction petition often indicates that the federal habeas lawyers has discovered claims which the state postconviction attorney failed to discover or failed to raise properly. Reappointing that attorney to handle the case does not ensure the defendant will be competently represented. In addition, a number of years may have passed since state postconviction counsel reviewed the record in the case, requiring additional time to review a case about which he or she has since forgotten the relevant details.

Appointment of counsel from the Supreme Court's list also does not serve judicial economy if the federal habeas lawyer is not on that list and is not appointed to the state postconviction. The state lawyer will spend hundreds of hours reviewing a file which the

federal lawyer has already reviewed. Because two lawyers will be working on the case simultaneously, the file, which may consist of thousands of pages, must be copied, adding unnecessary expense for the appointing court.

Filing Deadlines in Capital Cases

The amendment proposes that there be a thirty day deadline for filing a successive petition in a capital case following the appointment of counsel. Second Amended Petition, Appendix A, at 7. This is an inordinately short time frame. In the Project's experience, preparation of a petition for postconviction relief in a capital case requires approximately 1000 hours of attorney time, about half of an attorney's annual workload. Given the number of capital postconviction petitions filed in Arizona which are supported by an incomplete review of the record and little or no investigation, many successive postconviction petitions require that an enormous amount of time be devoted to them. In addition, where the attorney handling the successive petition is new to the case, review of the record alone may require the expenditure of a few hundred hours. While this much time may not be necessary to the preparation of every successive petition, even one which requires only one-fourth of the time to review the record, investigate the claims, and research and draft the petition will require more than the approximately one hundred fifty hours the attorney could devote to it in only thirty days. Further, these numbers presume that the attorney has no obligations in other cases. This is rarely true, and indicates that substantial additional time is appropriate. The Project recommends an initial deadline of sixty or ninety days, with thirty day extensions available on showings of good cause.

Filing Status Reports to Supreme Court for Delayed Capital Petitions

The Project views this proposed amendment as an unnecessary bureaucratic layer in capital litigation. Currently, the rule requires a finding of good cause by the trial court before extensions may be granted. There is no evidence that these extensions are being granted irresponsibly. Forcing the Supreme Court to review each of these decisions in all of the pending capital cases will not contribute to efficiency and will not serve the ends of justice.

Pleading Preclusion Exception in Notice

The notice of postconviction relief was designed as a simple mechanism to initiate postconviction proceedings and trigger appointment of counsel. It is often filed by defendants, who lack legal training and an understanding of procedural requirements. Only after counsel is appointed will most defendants be able to articulate an exception to the preclusion rules.

In addition, determining whether an exception applies requires a court to compare the ground asserted to the preclusion rules. This comparison is easier to make once the petition is filed and the grounds for relief are fully set forth. Requiring that an exception be cited in the notice forces the postconviction court to review the notice without knowing whether the claim ultimately asserted will fit the exception, and then conduct this review again when the petition is filed to ascertain whether the claim is entitled to review.

Page Limitations

The Project strongly opposes the proposed amendment to Rule 32.5 which establishes a page limit of 40 pages for a postconviction petition and 20 pages for a reply. These page limits are shockingly inadequate for presenting and preserving a defendant's claims for relief

in a capital case. Capital trials may last for months and involve the disposition of hundreds of motions and objections. The direct appeal in a capital case involves an independent review of the death sentence and all of the evidence supporting or contraindicating that sentence. The petition for postconviction relief is the defendant's first opportunity to challenge any constitutional violations which are not apparent in the record in the case. This includes claims of ineffective assistance of counsel at trial, at sentencing, and on appeal. It is the first opportunity to challenge errors made in the Supreme Court's decision in the case. In the Project's extensive experience, 40 pages is wholly insufficient for the presentation of these important claims and the facts supporting them.

Rule 32.5 requires that the petition contain "every ground known to [the defendant] for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed. . . ." In addition, petitioners must be permitted to include all known claims, and the underlying facts supporting them, in order to exhaust state remedies for purposes of federal habeas review. The proposed page limitations are inconsistent with these requirements.

Presumably, this amendment is aimed at forcing attorneys to present what they view as the defendant's strongest issues and abandon the rest. Such "winnowing" is not appropriate in a capital case. One oft-cited example illustrates this point: the cases of two codefendants, John Eldon Smith and Rebecca Machetti.

They were sentenced to death by unconstitutionally composed juries within a few weeks of each other in Bibb County, Georgia. Machetti's lawyers challenged the jury composition in state court; Smith's lawyers did not because they were unaware of the Supreme Court decision prohibiting gender discrimination in juries.

A new trial was ordered for Machetti by the federal court of appeals. At that trial, a jury which fairly represented the community imposed a sentence of life imprisonment. The federal courts refused to consider the identical issue in Smith's case because his lawyers had not preserved it. He was executed, becoming the first person to be executed under the Georgia death penalty statute upheld by the U.S. Supreme Court in 1976. Had Machetti been represented by Smith's lawyers in state court and Smith by Machetti's lawyers, Machetti would have been executed and Smith would have obtained federal habeas corpus relief.

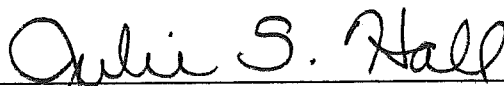
Stephen B. Bright, *Counsel for the Poor: the Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1839-1840. Whether counsel is simply unaware that a claim exists or is forced to omit claims from a state court petition due to page limitations, the result is the same: the defendant may be executed even if he or she would have been entitled to relief on that claim. Even points of law which have been treated as beyond question, the constitutionality of Arizona's judge-sentencing scheme for example, may be reversed and defendants who have sacrificed those claims to brevity may not obtain relief. See Jones v. United States, 119 S.Ct. 1215 (1999)(questioning continuing viability of judge findings of aggravating circumstances in capital cases). While capital defense attorneys well understand that unnecessary length in a petition does nothing to serve their clients' interests, they also understand the duty to present and preserve every claim which may entitle their clients to relief. To do so within 40 pages is usually impossible and will force attorneys to violate that duty.

Transmission of the Record in Capital Cases

The Project opposes the proposed amendment to Rule 32.9(e) to provide that, unlike noncapital cases, the record of the postconviction proceedings in capital cases will only be

transmitted if requested by the appellate court. The proposal offers no justification for the disparate treatment of capital and noncapital cases here, and we cannot discern a legitimate one. The decision to grant or deny a petition for review should be as well informed in a capital case as it is in a noncapital case. Because noncapital cases far outnumber capital cases, relatively few judicial resources would be saved by this change.

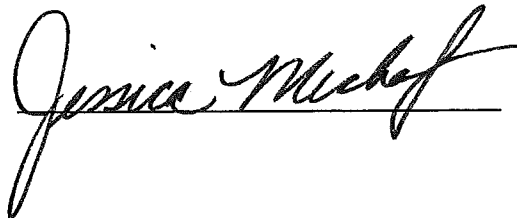
Respectfully submitted this 5th day of June, 2000.



Arizona Capital Representation Project
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Copies of the foregoing mailed
this 5th day of June, 2000, to:

Hon. Ronald S. Reinstein, Chair
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RECEIVED

MAY 24 2000

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FILED
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ARIZONA SUPREME COURT

In the Matter of:)
)
RULE 32, ARIZONA RULES)
OF CRIMINAL PROCEDURE)
)
)
)
)
_____)

SUPREME COURT NO. R-97-0006
COMMENTS ON SECOND AMENDED
PETITION TO AMEND RULE 32 OF THE
ARIZONA RULES OF CRIMINAL
PROCEDURE

Pursuant to this Court's Orders of February 4, 2000, and March 27, 2000, Gregory A. McCarthy, member of the State Bar of Arizona, submits the following comments, embodied in the Memorandum below, on the Second Amended Petition to Amend Rule 32, filed by the Post-conviction Relief Committee on February 3, 2000. More specifically, the comments below are directed to those parts of the petition pertaining to recognizing a ground for actual innocence.

RESPECTFULLY SUBMITTED this 24th day of May, 2000.

G McCarthy

GREGORY A. MCCARTHY
Member, State Bar of Arizona

MEMORANDUM

I. DOES THE PROPOSED AMENDMENT TO RULE 32.2(B) CREATE AN EFFECTIVE EXCEPTION FOR DEMONSTRABLE CLAIMS OF ACTUAL INNOCENCE?

The Post-conviction Relief Committee (Committee) recommends that an exception be placed in Rule 32.2(b) for “a claim where the petitioner shows that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that *but for constitutional error*, no reasonable fact finder would have found the petitioner guilty of the underlying offense.” (Emphasis added.) The requirement for constitutional error defeats the apparent purpose of the proposed exception. Claims of actual innocence ordinarily assume that the conviction was constitutional; they simply assert that it was factually wrong. Convincing claims of actual innocence will be extremely rare. Even so, only a fraction of convincing claims of actual innocence will be capable of being tied to constitutional error. The proposed language creates an exception for egregious constitutional error (constitutional error that likely caused the conviction of someone who is actually innocent), which does not appear to have been the intent.

II. IS FEDERAL HABEAS RELIEF GENERALLY AVAILABLE ON A CLAIM OF ACTUAL INNOCENCE?

One issue raised by the petition is whether relief may be had in federal habeas court on a substantive claim of actual innocence. *See* Petition at 3. This issue affects the need for a state remedy.

The federal habeas remedy does not generally recognize a substantive claim of actual innocence. As the United States Supreme Court explained in *Herrera v. Collins*,¹ the purpose of federal habeas review is to correct constitutional violations and not errors of fact.² *Herrera* did admit

¹506 U.S. 390 (1993).

²*See id.* at 400.

the *possibility* that substantive due process might prevent the *execution* of someone who has demonstrated actual innocence.³ The Ninth Circuit in *Carriger v. Stewart*,⁴ in a closely divided decision, recognized a *Herrera* claim, though it did not find one in that case. To the extent that a *Herrera* claim is viable, it does not affect the conviction, only the execution.

The Committee's proposed Comment to Rule 32.2(b) states that the proposed language for the exception comes from 28 U.S.C. § 2254(e)(2)(B). *See* Appendix A at 4. That statute defines the standard governing the granting of evidentiary hearings in federal habeas proceedings. The standard derives from *Sawyer v. Whitley*,⁵ where it was fashioned by the United States Supreme Court for determining when a successive petition may be filed challenging a decision to impose the death penalty.⁶

Claims of actual innocence, such as a *Sawyer* claim, have a role in the federal habeas remedy, but ordinarily only to overcome procedural bars to an on-the-merits consideration of an independent constitutional claim. They ordinarily are not in themselves a basis for relief from a conviction. When a habeas petitioner succeeds in demonstrating actual innocence, all that usually happens is that the court is able to sidestep a procedural bar and reach the merits of an unconnected constitutional claim. If the court decides that the constitutional claim lacks merit, it will deny relief, even though the petitioner has demonstrated actual innocence.

³*See id.* at 417.

⁴132 F.3d 463 (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998).

⁵505 U.S. 333 (1992).

⁶*See id.* at 348.

Accordingly, we should not think that the federal courts will pick up any slack at all on claims of actual innocence of underlying convictions, or death penalties for that matter.

III. IS THERE A NEED TO ADD A STATE GROUND FOR RELIEF FOR ACTUAL INNOCENCE?

Although a convincing claim of actual innocence will be extremely rare, the state system should have a reliable way to respond when one occurs. As the United States Supreme Court said in *Schlup v. Delo*,⁷ “[C]oncern about the injustice that results from the conviction of an innocent person has been at the core of our criminal justice system.”⁸ Creative jurisprudence and pardons do not pass the dependability test.

The present Rule 32.1 grounds do not sufficiently assure relief on a convincing claim of actual innocence. Such a claim will not likely satisfy the ground at Rule 32.1(a) for a constitutional violation, because such a claim ordinarily asserts a factual mistake only.

Such a claim may not satisfy the present ground for newly discovered evidence at Rule 32.1(e), because the new evidence may be such as could have been discovered at trial with reasonable diligence or may be technically cumulative. Sometimes demonstrable claims of actual innocence will satisfy this ground, but not always.

IV. WILL THE COMMITTEE’S PROPOSAL SUCCEED IN PROVIDING A VIABLE CLAIM OF ACTUAL INNOCENCE IF THE REQUIREMENT FOR A CONSTITUTIONAL VIOLATION IS DELETED?

Even deleting the requirement for a constitutional violation, all the proposal does is create an exception to the rules of preclusion at Rule 32.2(b) for a claim of actual innocence. That is a necessary first step toward accommodating such a claim. But the claim is not fully accommodated

⁷513 U.S. 298 (1995).

⁸*Id.* at 325.

unless the grounds for relief specified at Rule 32.1 encompass it. Getting past preclusion only gives the petitioner the opportunity to assert a Rule 32.1 ground.

V. WHAT SHOULD BE DONE MECHANICALLY TO ACCOMMODATE DEMONSTRABLE CLAIMS OF ACTUAL INNOCENCE?

If the goal is to institutionalize a reliable remedy for a demonstrable claim of actual innocence, we should begin by defining a new ground for relief at Rule 32.1. Then we should make a Rule 32.2(b) exception to the rules of preclusion for the ground.

The pattern of the present rules is to state the grounds for relief at Rule 32.1 and then identify the preclusion exceptions at Rule 32.2(b) simply by referring to the Rule 32.1 subsection numbers. As Rule 32.2(b) now states, "Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), and (g)." The Committee's proposal falls out of this pattern because it tries to create a preclusion exception for a ground before recognizing the ground. So the definition of the proposed ground appears at Rule 32.2(b) when it should appear at Rule 32.1.

VI. HOW SHOULD WE DEFINE A GROUND FOR RELIEF FOR ACTUAL INNOCENCE?

We want a formulation that will fully accommodate demonstrable claims of actual innocence but that is sufficiently stringent and clear to deter frivolous claims and to allow the ready identification and dismissal of unmeritorious claims.

One possibility would be based on the *Sawyer* standard. This new ground, which modifies the *Sawyer* standard by omitting the requirement for a constitutional violation, would state: "The petitioner demonstrates by clear and convincing evidence that no reasonable fact-finder would have found the petitioner guilty beyond a reasonable doubt in light of the new evidence."

Another possibility, which sets a lower bar, draws from what is called the *Carrier*⁹ standard, which was designed by the federal courts for overcoming procedural bars obstructing challenges to the underlying conviction. This new ground would state: “The petitioner demonstrates that it is more probable than not that no reasonable fact-finder would have found the petitioner guilty beyond a reasonable doubt in light of the new evidence.”¹⁰ Favoring the *Carrier* standard is that the United States Supreme Court intended it to apply when the underlying conviction is challenged, whereas the Court intended *Sawyer* to apply when a decision to impose the death penalty is challenged.¹¹

Another possibility is the *Herrera* standard as articulated by the Ninth Circuit in *Carriger*. This standard would state: “The petitioner has affirmatively demonstrated a probable showing of actual innocence.”¹² Theoretically, this is the sternest test, because it does not involve just raising doubts about guilt but requires affirmative proof of actual innocence. Also, in theory, this may be the more appropriate standard because it assumes a constitutionally impeccable conviction, whereas *Carrier* and *Sawyer* claims cast doubt on the constitutional validity of the conviction of the offense or the death penalty.¹³

Except for the *Herrera* standard, these standards have been fully narrowed and clarified in federal case law,¹⁴ which means that the state courts would not have to start from a clean slate if we

⁹See *Murray v. Carrier*, 477 U.S. 478 (1986).

¹⁰*Id.* at 496.

¹¹See *Schlup*, 513 U.S. 298, 324–26.

¹²132 F.3d 463, 476.

¹³See *Schlup*, 513 U.S. 298, 315.

¹⁴See *id.* at 329.

were to model our claim of actual innocence on *Carrier* or *Sawyer*. *Herrera* is an exception because the Supreme Court's recognition of it was tenuous and the Court has not fully articulated it.¹⁵

From a practical standpoint, the *Herrera* standard may be too vague. Also, there may not be much practical difference between modified *Carrier* and *Sawyer* standards, because they both set a very high threshold while still giving a court sufficient leeway to grant relief on a compelling claim of actual innocence.

VII. HOW WOULD AUTHORIZING A GROUND FOR RELIEF FOR ACTUAL INNOCENCE AFFECT CASELOAD?

Prisoners already advance post-conviction claims of actual innocence based on new evidence. Right now they try to shoehorn these claims into the ground for newly discovered evidence. So, to a certain extent, the system has already adjusted to claims of actual innocence based on new evidence. Only an exceptional claim of actual innocence will be colorable under a modified *Carrier* or *Sawyer* standard, and so most such claims will be subject to summary dismissal.

VIII. SHOULD WE SUBSTITUTE A GROUND FOR ACTUAL INNOCENCE FOR THE PRESENT GROUND FOR NEWLY DISCOVERED EVIDENCE?

The present ground for newly discovered evidence and a new ground for actual innocence would serve related, but significantly different, purposes. Both are based on new evidence, but the present ground for newly discovered evidence is more concerned with the fairness of the trial in light of the new evidence, whereas a ground for actual innocence would be more concerned with the accuracy of the result in light of the new evidence. Because of this difference in purpose, the present ground for newly discovered evidence has a broader sweep than would a ground for actual innocence. More often will a trial have been unfair in light of new evidence than will the result have been

¹⁵See 506 U.S. 390, 417.

mistaken in light of new evidence. The present ground for newly discovered evidence has worked well for many years, has been carefully refined over the years, and should remain in place with the adoption of a ground for actual innocence.

IX. SHOULD WE ALSO ADOPT A GROUND OF ACTUAL INNOCENCE OF THE DEATH PENALTY, IN ADDITION TO A GROUND OF ACTUAL INNOCENCE OF THE OFFENSE?

The argument for also adopting a ground of actual innocence of the death penalty relies on the analogy to the federal *Sawyer* claim, which is designed to apply to challenges to the capital decision. *Sawyer* makes clear that a petitioner may only establish actual innocence of the death penalty by disproving an element that renders the petitioner eligible for the death penalty; disproving found mitigation does not suffice.¹⁶

Accordingly, *Sawyer* works better in states where the state must prove each of a set number of aggravating circumstances to render the defendant eligible for the death penalty, because then disproof of one of these aggravating factors disqualifies the defendant from receiving the death penalty. Arizona's capital sentencing scheme only imperfectly fits this pattern. In Arizona, only one aggravating circumstance is needed to render the defendant eligible for the death penalty, and often the sentencing court finds multiple aggravating circumstances. When multiple aggravating circumstances are present, disproof of one, or perhaps even more, does not render the defendant ineligible for the death penalty. So, extending the *Sawyer* analogy, the only way an Arizona petitioner may prove actual innocence of the death penalty is to disprove all found aggravating circumstances.

It would be possible to design a claim of actual innocence of the death penalty that required the defendant to demonstrate actual innocence of all found aggravating circumstances. Such a claim

¹⁶See 505 U.S. 333, 347.

might read: “The petitioner demonstrates by clear and convincing evidence that no reasonable court would have found the existence of any capital aggravating circumstances beyond a reasonable doubt.”

On the other side, there are reasons to hesitate before establishing a separate ground of actual innocence of the death penalty. First, as the United States Supreme Court noted in *Schlup*, claims asserting actual innocence of the offense pose less of a threat to principles of finality than do claims asserting actual innocence of the death penalty, because “[t]hrough challenges to the propriety of imposing a sentence of death are routinely asserted in capital cases, experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.”¹⁷ It is also true, dispensing with the reference to constitutional error, that a substantial claim that an innocent person has been convicted will be extremely rare. Were we to adopt a ground of actual innocence of the death penalty, it is probable that it would be routinely and repetitively invoked.

Second, a perhaps less telling point, *Schlup* also perceives less of a need for relief from a wrongful death penalty than from a wrongful conviction. Drawing a distinction between a defendant who is guilty of the murder but wrongfully sentenced to death and a person who is innocent of the murder and sentenced to death, *Schlup* states: “The quintessential miscarriage of justice is the execution of a person who is entirely innocent.”¹⁸

¹⁷513 U.S. 298, 324.

¹⁸*Id.* at 324–25.

RESPECTFULLY SUBMITTED this 24th day of May, 2000.

G. McCarthy

GREGORY A. MCCARTHY
Member, State Bar of Arizona

COPY of foregoing mailed
this 24th day of May, 2000, to:

Hon. Ronald S. Reinstein
Chair, Post-conviction Relief Committee
Superior Court
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Phoenix, ARIZONA 85003-2205

Greg

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ARIZONA SUPREME COURT

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CLERK SUPREME COURT

In the Matter of:)	SUPREME COURT NO. R-97-0006
)	
RULE 32, ARIZONA RULES)	SECOND AMENDED PETITION TO
OF CRIMINAL PROCEDURE.)	AMEND RULE 32 OF THE ARIZONA
)	RULES OF CRIMINAL PROCEDURE
)	

The Post-conviction Relief Committee ("Committee"), through the chair, The Honorable Ronald S. Reinstein, petitions this court to amend Rule 32 of the Arizona Rules of Criminal Procedure. This petition is based upon the Committee's belief that changes to Rule 32 are necessary to conform the rule to recent changes in the law, including opinions issued by the Arizona appellate courts since 1992.

I. INTRODUCTION

In November of 1995, the Arizona Attorney General filed a petition to amend Rule 32 based upon legislative amendments to Arizona Revised Statutes sections 13-4232, 13-4234, 13-4235, and 13-4236. A short time later, in February, the Arizona Supreme Court appointed a committee, to be chaired by The Honorable Ronald S. Reinstein. The Committee was asked to study in depth any problems or inconsistencies with the existing version of Rule 32; *Montgomery v. Sheldon*, 181 Ariz. 257, 889 P.2d 614 (1995) (*opinion supplemented*, 182 Ariz. 118, 893 P.2d 1281) and its progeny, and recent legislative amendments to those statutes referenced above,

and to make recommendations for rule changes. This Committee filed its petition to amend Rule 32 in 1997.

At the request of the Arizona Supreme Court, the attorney general attempted to "blend" its petition with this Committee's petition. After months of effort, the attorney general concluded that irreconcilable conflicts between the petitions precluded this. After this Court's decisions in *State ex rel. Napolitano v. Brown*, ___ Ariz. ___, 982 P.2d 815 (1999), and *Moreno v. Gonzales*, 192 Ariz. 131, 962 P.2d 205 (1998), the attorney general withdrew the petition that it filed in November of 1995.

II. SUMMARY OF PROPOSED AMENDMENTS

The Amended Petition:

1. Adds a provision under Rule 32.1 (Scope of Remedy) to the effect that any person who pleaded guilty or no contest, or who admitted a probation violation, "shall have the right to file a post-conviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding." Also adds failure to file a timely "of-right" post-conviction proceeding as a ground justifying a filing under Rule 32.1(f), assuming such failure was without fault on the part of the defendant.

2. To clarify the changes summarized in (1) above, adds a comment that such changes are necessitated by *Montgomery v. Sheldon*, 181 Ariz. 257, 889 P.2d 614 (1995) (opinion supplemented, 182 Ariz. 118, 893 P.2d 1281) and states that post-conviction

relief proceedings under *Montgomery* shall be known as an "of-right" proceeding.

3. In Rule 32.2(b), adds a provision that a claim of actual innocence shall not be subject to preclusion. Although the Committee as a whole does not believe that such an exception is necessary, and proposes it only pursuant to the Arizona Supreme Court's request, the Committee suggests that if there is such an exception, it mirror the federal claim recognized by Congress. See 28 U.S.C. § 2254(e)(2)(B). Amended Rule 32.2(b) also requires that a defendant identify the specific exception to the preclusion rule which justifies filing a successive or untimely post-conviction relief proceeding in the notice of post-conviction relief, rather than in the petition itself, as required by the existing rule. If the defendant does not identify in the notice the specific exception (along with meritorious reasons) the notice of post-conviction relief "shall be summarily dismissed."

Adds a comment clarifying the foregoing changes, including a comment that the actual innocence exception to preclusion is identical to the federally recognized claim set forth in 28 U.S.C. § 2254(e)(2)(B).

4. Adds a provision in Rule 32.2(c) that, though the state has the burden to plead and prove grounds of preclusion, any court on review of the record may determine that an issue is precluded.

"regardless of whether the state raises preclusion." This change is in accordance with recent statutory changes.

5. Adds a provision to Rule 32.4(a) (Form, Filing and Service of Petition) stating that in a Rule 32 of-right proceeding, the notice must be filed within 90 days after the entry of judgment or within 30 days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In all other non-capital cases, the notice must be filed within 90 days after the entry of judgment or within 30 days after the mandate in the direct appeal, whichever is later.

These amendments are designed to conform the rule to the holding of *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1996) that a pleading defendant is constitutionally entitled to effective assistance of counsel on the first petition for post-conviction relief.

6. Makes changes to the Appointment of Counsel provisions of Rule 32.4(c) to separate capital from non-capital cases. Because appointment of counsel in a capital case is governed by statute, the rule specifically addresses appointment in such cases. As to non-capital cases, there are two kinds: a Rule 32 of-right proceeding and all other non-capital proceedings. The amendment provides for appointment of counsel in a Rule 32 of-right

proceeding. In all other non-capital proceedings, the rule provides for discretionary appointment of counsel.

Rule 32.4(c)(2) also sets forth counsel's obligations in a Rule 32 of-right proceeding. These obligations are taken from *Lammie v. Barker*, 185 Ariz. 263, 915 P.2d 662 (1996).

7. Amends Rule 32.4(d) to provide for an expeditious review of any request for transcripts. The rule would also allow the trial court to limit transcript preparation to "only those transcripts" deemed necessary to resolve the issues to be raised. Presently, the rule provides that the court shall order "those portions of the record . . . that it deems necessary" to resolve the issues raised. Pursuant to this rule, trial courts currently direct preparation of all transcripts when requested. Further, the rule prescribes that transcripts shall be prepared within 60 days of the order granting the request. This change is deemed necessary so that court reporters timely prepare the transcripts.

The amendment permitting the trial court to direct preparation of only those transcripts deemed necessary is consistent with *Wilson v. Ellis*, 176 Ariz. 121, 859 P.2d 744 (1993)

8. Amends Rule 32.5 to add page limitations for petitions for post-conviction relief in all cases. In non-capital cases, any petition and response shall not exceed 25 pages, and any reply shall not exceed 10 pages. In capital cases, the petition and response shall not exceed 40 pages, and any reply shall not exceed

20 pages. The amendments also provide that any noncomplying petition be returned to the defendant. The defendant is given 30 days within which to file a corrected petition. If a corrected petition is not filed within the time limit, the rule clarifies that the dismissal of the proceeding is with prejudice.

10. Amends Rule 32.5 to drop the requirement that the defendant verify under oath that the petition includes every ground known to the defendant. As a practical matter, most petitions are not verified, and a successive petition is subject to preclusion whether a previous petition was verified or not.

A minority of the committee opposes this recommended change. The minority believes that the verification requirement serves important purposes. For example, it emphasizes to the defendant the importance of including all of the claims in a single petition and allows for simpler application of the waiver and preclusion doctrines in the case of successive petitions.

11. Changes Rule 32.6 to clarify that a party must make a showing of extraordinary circumstances before the court will grant an extension of time in which to file any pleading.

12. Changes the heading of Rule 32.8(a) from "Plenary" to "Evidentiary." Subsection (e) is added to clarify that a party is entitled to a transcript of any evidentiary hearing held pursuant to Rule 32 and that preparation of the transcript shall be at county expense if the defendant is indigent.

13. Amends subsection (a) of Rule 32.9 to provide that no response to a motion for rehearing is to be filed unless requested by the court. However, the court will not grant a motion for rehearing absent a response.

Several additional changes are made to Rule 32.9 to conform to recommendations of the Appellate Case Processing Committee.

Subsection (c) changes the place of filing a petition for review to the appropriate appellate court and requires the petitioner to file a notice of such filing with the superior court. The rule permits the trial court to rule on motions for extensions of time for filing, but prescribes that the appellate court will rule on all other motions, including motions to exceed page limits.

Changes to paragraph (c)(1) include changing the form of caption to the appellate court because the petition for review will be filed in that court. It also provides that petitions for review shall not have covers or bindings, and sets forth margin requirements. The requirement for appendices in non-capital cases is deleted. The number of required copies of appendices in all cases is one.

Paragraph (c)(1)(iv) requires that in a non-capital case, if no appendix is filed, the petition set forth specific references to the record.

Subsection 32.9(e) retains the requirement for filing the record in non-capital cases, but provides that the record is not to

be transmitted in capital cases unless requested by the appellate court.

Subparagraph 32.9(c)(1)(i) eliminates the need for a synopsis of the trial court's rulings. Subsection (h) provides for different procedures for returning the record in capital and non-capital cases.

These changes are recommended so that the requirements for a petition for review pursuant to Rule 32.9 will, in as many aspects as practicable, be consistent with the requirements for a petition for review pursuant to Rule 31.19.

14. Amends form 24(c) to be consistent with the proposed amendments to Rules 32.2(b) and 32.4(a). Section 3 is amended to clarify the origin of the defendant's conviction.

Section 7 of the form sets forth the exceptions to preclusion and, if the notice is untimely or is a successive notice, requires the defendant to identify the exception or exceptions applicable to the untimely or successive proceeding. If the petitioner does not identify an exception to timeliness or preclusion, under the proposed changes to Rules 32.2 and 32.4, the notice is subject to dismissal. Finally, subsection (c) requires the defendant to briefly describe the claim.

The form also adds a warning to the defendant that the defendant must include in the petition "every ground for relief which is known and which has not been raised and decided

previously." The form also requires the defendant to acknowledge "that failure to raise any known ground for relief in [the] petition will prohibit [the defendant] from raising it at any future date."

III. DISCUSSION OF PROPOSAL

In 1992, comprehensive changes were made to Rule 32 of the Arizona Rules of Criminal Procedure. Effective that same year, the Arizona Legislature amended the statutes governing post-conviction relief and appeals by defendants. These changes required that any defendant that pleaded guilty, no contest, or admitted to a probation violation, waived the right of direct appeal. For example, Rule 17.2 of the Arizona Rules of Criminal Procedure was amended to read in part:

Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him or her of and determining that he or she understands the following:

. . . .

e. That by pleading guilty or no contest in a noncapital case the defendant will waive the right to have the appellate courts review the proceedings by way of direct appeal, and may seek review only by filing a petition for post-conviction relief pursuant to Rule 32 and, if denied, a petition for review.

These new procedures generated significant litigation which answered important questions concerning this new form of appellate review. The most notable decision in this respect is *Montgomery v. Sheldon*.

IV. "MONTGOMERY" AND ITS PROGENY

In *Montgomery*, the Supreme Court granted review to reconcile conflicting opinions of the Court of Appeals on the issue of whether late notification by appointed counsel that no assertedly colorable claims for relief exist constituted "good cause" to entitle a Rule 32 defendant to an extension of time to file a pro se post-conviction relief petition. In resolving this conflict, the Court broadly examined Rule 32 and its relationship to a direct appeal. In doing so, the Court held that, although direct appeal rights were waived, these defendants enjoyed a constitutional right to Rule 32 review. The Court reasoned that, because article 2, section 24 of the Arizona Constitution guaranteed a right of appeal in all cases and the amended rules provided that defendants who pleaded guilty or admitted probation violations waived the right to direct appeal, a Rule 32 proceeding was the only avenue available to such defendants for exercising the constitutional right to appellate review. The Court held that this right could not be waived by a plea agreement or admission to a probation violation. Thus, the *Montgomery* court concluded that article 2, section 24 mandated that defendants have a constitutional right to file a post-conviction relief proceeding.

Later, the Court of Appeals held that a pleading defendant could raise an ineffective assistance of counsel claim with respect to a first post-conviction relief proceeding in a second, and

untimely, petition for post-conviction relief because the first petition for post-conviction relief was the defendant's "direct appeal." *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995). Even though the second petition was untimely pursuant to Rule 32.4(a), the court held that "[i]n keeping with *Montgomery's* analogy that a pleading defendant's first petition for post-conviction relief is 'the appeal for a defendant pleading guilty,' the resolution of the time-limit dilemma posed by Rule 32.4(a), is to treat a pleading defendant's first petition as a 'direct appeal' for purposes of the time limits of Rule 32.4(a)." *Id.* at 131, 912 P.2d at 1360 (citations omitted).

The *Pruett* decision actually answered two questions raised by *Montgomery*. The first was whether or not a defendant could challenge the effectiveness of his counsel on his first petition for post-conviction relief. Generally, a defendant does not enjoy the constitutional right to counsel in post-conviction relief proceedings. *State v. Mata*, 185 Ariz. 319, 916 P.2d 1035 (1996); *State v. Armstrong*, 176 Ariz. 470, 862 P.2d 230 (App. 1993). However, given the constitutional analogy drawn by *Montgomery* and that court's pronouncement that a pleading defendant's Rule 32 petition was constitutional, the court felt compelled to answer in the affirmative. The court was then left to address the dilemma of the untimeliness of the second petition for post-conviction relief. It was virtually impossible for *Pruett* to file a timely second

petition for post-conviction relief in which he challenged his counsel's performance on his first petition for post-conviction relief. Rule 32.4(a) required that the petition be filed within 90 days of the entry of judgment and sentence. Thus, the court concluded that the second notice of post-conviction relief raising a claim of ineffective assistance of counsel in a first petition was timely if filed within 30 days of the order and mandate "affirming the trial court's denial of the petitioner's first petition for post-conviction relief." *Pruett*, 185 Ariz. at 131, 912 P.2d at 1360.

Defense counsel was also faced with questions regarding counsel's responsibility after the *Montgomery* decision. Prior to the 1992 rule amendments, defense counsel had no further obligations in a Rule 32 proceeding after the trial court ruled on a motion for rehearing. *State v. Shedd*, 146 Ariz. 5, 703 P.2d 552 (App. 1985). However, because the defendant's right to post-conviction relief was held to be constitutional and analogous to a direct appeal, there were concerns that a petition for review to the court of appeals was no longer discretionary and that counsel had an obligation to assist the petitioner.

The Court of Appeals answered some of these questions in *State v. Smith*, 183 Ariz. 424, 904 P.2d 1248 (App. 1996). Later, the Supreme Court reviewed the *Smith* decision, *State v. Smith*, 184 Ariz. 456, 910 P.2d 1 (1996), and issued an opinion in which it

concluded that "our constitution does not require, and the rules do not extend, the right to appointed counsel for indigent defendants in Rule 32 proceedings beyond the trial court's mandatory consideration and disposition of the PCR." (Emphasis in original; cite omitted.) *Id.* at 459, 910 P.2d at 5. The Court also concluded that "the Court of Appeals, however, retains discretion over whether to grant review." *Id.* After concluding that review in the Court of Appeals was discretionary, the court held that a petitioner did not have the right to appointed counsel. Finally, the Court noted that although *Montgomery* held that the Court of Appeals must review for fundamental error when it considered whether to grant review of a pleading defendant's denial of post-conviction relief, it no longer had to do so because the legislature repealed A.R.S. section 13-4035. That statute had been interpreted to require the Court of Appeals to review every direct appeal for fundamental error. See *State v. Powell*, 5 Ariz. App. 51, 423 P.2d 127 (1967).

As might be expected with any broad change, the passage of time has revealed inadequacies and oversights in the 1992 amendments. The amendments proposed here should be adopted by this Court to bring Rule 32 more in line with the intent and purpose of the rule, with victim's rights, and with appellate decisions that have interpreted the application of the rule.

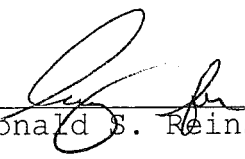
VI. CONCLUSION

The proposed changes to Rule 32 are attached to this petition as "Appendix A." Amended Form 24(c), "Notice of Post-Conviction Relief," is attached as "Appendix B."

The Committee concludes that changes to Rule 32 are necessary and requests that this Court circulate this petition for public comment.

RESPECTFULLY SUBMITTED this 3rd day of February, 2000.

Post-conviction Relief Committee

By 
Hon. Ronald S. Reinstein
Chair

An original and six copies were filed this ___ day of February, 2000 with:

Noel Dessaint
Clerk, Arizona Supreme Court
1501 West Washington
Phoenix, Arizona 85007

APPENDIX A

RULE 32. OTHER POST-CONVICTION RELIEF

Rule 32.1 Scope of remedy

Subject to the limitations of Rule 32.2, 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.

Any person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest, shall have the right to file a post-conviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding.

Grounds for relief are:

- a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;
- b. The court was without jurisdiction to render judgment or to impose sentence;
- c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
- d. The person is being held in custody after the sentence imposed has expired;
- e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:

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

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

(3) 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.

f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal from the judgment, sentence, or both within the prescribed time was without fault on the defendant's part; or

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

Comment

Changes in the first and second paragraphs and in subsection (f) are to meet and accommodate the requirements of Montgomery v. Sheldon, 181 Ariz. 257, 889 P.2d 614 (1995) (opinion supplemented, 182 Ariz. 118, 893 P.2d 1281), and its progeny. A petition when authorized under Montgomery is referred to in the above provision as an "of-right" proceeding. Relief pursuant to subsection (f) will continue to be unavailable to all post-conviction relief

proceedings not "of-right". See Moreno v. Gonzalez, 191 Ariz. 131, 962 P.2d 205 (1998).

Rule 32.2. Preclusion of remedy.

a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

(1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;

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

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

b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f) and (g), or to a claim where the petitioner shows that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense. When a claim under ~~Rules 32.1(d), (e), (f), or (g)~~ these enumerated exceptions is to be raised in a successive or untimely post-conviction relief proceeding, petition, the petition notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and

indicating why the claim was not stated in the previous petition or in a timely manner, the petition notice shall be summarily dismissed.

c. Standard of proof. The state shall plead and prove any ground of preclusion by a preponderance of the evidence. Though the state has the burden to plead and prove grounds of preclusion, any court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion.

Comment

Amendments to subsection (b) intended to conform to recent statutory changes include a requirement that a defendant set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. The failure to identify the specific exception will allow for dismissal on the notice alone. Additionally, the amendments add that a claim of actual innocence is an exception to preclusion. A claim which would satisfy the federal standard set forth in 28 U.S.C. § 2254(e)(2)(B), shall not be subject to preclusion.

Subsection (c) is amended to conform to recent statutory changes.

Rule 32.3. Nature of proceeding and relation to other remedies.

This proceeding is part of the original criminal action and not a separate action. It displaces and incorporates all trial court post-trial remedies except post-trial motions and habeas corpus. If a defendant applies for a writ of habeas corpus in a trial court having jurisdiction of his or her person raising any claim attacking the validity of his or her conviction or sentence, that court shall under this rule transfer the cause to the court where the defendant was convicted or sentenced and the latter court shall treat it as a petition for relief under this rule and the procedures of this rule shall govern.

Rule 32.4. Commencement of proceedings.

a. Form, Filing and Service of Petition. A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred. The court shall provide notice forms for commencement of first and successive post-conviction relief proceedings. In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In a all other non-capital cases, the notice must be filed within ninety days of after the entry of judgment and sentence or within thirty days of after the issuance of the order

and mandate ~~affirming the judgment and sentence on~~ in the direct appeal, whichever is the later. In a capital case, the clerk of the Supreme Court shall expeditiously file a notice for post-conviction relief with the trial court upon the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal. Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f) or (g) ~~or a claim where the petitioner shows that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense.~~ The notice shall bear the caption of the original criminal action or actions to which it pertains. On receipt of the notice, the court shall file a copy of the notice in the case file of each such original action and promptly send copies to the defendant, the county attorney, the defendant's attorney, if known, and the attorney general or the prosecutor, noting in the record the date and manner of sending the copies. If the conviction occurred in a court other than the Superior Court, the copy shall be sent to the office of the prosecuting attorney who represented the state at trial. The state shall notify the victim on request.

b. Notification of Appellate Court. If an appeal of the defendant's conviction, sentence, or both is pending, the clerk, or the court, within 5 days after the filing of the notice for

post-conviction relief, shall send a copy of the notice to the appropriate appellate court, noting in the record the date and manner of sending the copies.

c. Appointment of Counsel.

(1) Capital Cases. Upon the filing of ~~a timely~~ the notice by the clerk of the Supreme Court in a capital case, the Supreme Court, or if authorized by the Supreme Court, the presiding judge of the county from which the case originated, shall appoint counsel for the defendant pursuant to A.R.S. § 13-4041 and Rule 6.8 if the defendant is determined to be indigent. If the appointment is made by the presiding judge, a copy of the court's order appointing counsel shall be filed in the Supreme Court.

Upon the filing of a successive notice, the presiding judge shall appoint the previous post-conviction counsel of the capital defendant unless counsel is waived or good cause is shown to appoint another qualified attorney from the list described above.

On the first notice in capital cases, appointed counsel for the defendant shall have one hundred twenty days from the date of appointment to file a petition raising claims under Rule 32.1. A capital defendant proceeding without counsel shall have one hundred twenty days from the filing of the notice to file a petition. On the filing of a successive notice, appointed counsel, or the defendant if proceeding without counsel, shall file the petition within thirty days from the filing of the notice. On a showing of

good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. Additional extensions of thirty days may be granted for good cause. If a petition for post-conviction relief is not filed within one hundred and eighty days from the date of appointment of counsel, or one hundred and eighty days from the date the notice is filed, or the date a request for counsel is denied if the defendant is proceeding without counsel, the defendant or counsel for the defendant shall file a notice in the Supreme Court, advising the court of the status of the proceedings. Thereafter, defendant or counsel for the defendant shall file monthly status reports in the Supreme Court until the post-conviction proceedings are concluded in the trial court.

(2) Rule 32 of-right and non-capital cases. Upon the filing of a ~~or the first notice in a Rule 32 proceeding, in a non-capital case, or the second or subsequent notice in a non-capital case which, for the first time, raises a claim of ineffective assistance of counsel,~~ the presiding judge, or his designee, shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel ~~in successive or untimely petitions~~ is within the discretion of the presiding judge. In non-capital cases appointed counsel for the defendant shall have sixty days from the date of appointment to

file a petition raising claims under Rule 32.1. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition. ~~On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition.~~ Additional extensions of thirty days shall be granted only upon a showing of extraordinary circumstances.

In a Rule 32 of-right proceeding, counsel shall investigate the defendant's case for any and all colorable claims. If counsel determines there are no colorable claims which can be raised on the defendant's behalf, counsel shall file a notice advising the court of this determination. Counsel's role is then limited to acting as advisory counsel until the trial court's final determination. Upon receipt of the notice, the court shall extend the time for filing a petition by the defendant in propria persona. The extension shall be 45 days from the date the notice is filed. Any extensions beyond the 45 days shall be granted only upon a showing of extraordinary circumstances.

A ~~non-capital~~ defendant proceeding without counsel shall have sixty days to file a petition from the date the notice is filed or from the date the request for counsel is denied. ~~In capital cases, appointed counsel for the defendant shall have one hundred twenty days from the date of appointment to file a petition raising claims under Rule 32.1. A capital defendant proceeding without counsel~~

~~shall have one hundred twenty days from the filing of the notice to file a petition. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition. On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. In non-capital cases, additional extensions of thirty days shall be granted only in extraordinary circumstances. In capital cases, additional extensions of thirty days may be granted for good cause.~~

d. Transcript Preparation. If the record transcripts of the trial court proceedings ~~has~~ have not been previously transcribed, the defendant may request on a form provided by the clerk of court that the record transcripts be prepared. The court shall expeditiously review the request and order only those ~~portions of the record transcripts~~ prepared that it deems necessary to resolve the issues to be raised in the petition. The preparation of the record transcripts shall be at county expense if the defendant is indigent. The time for filing of the petition shall be tolled from the time a request for ~~the record transcripts~~ is made until the record is transcripts are prepared or the request is denied. Transcripts shall be prepared and filed within sixty days of the order granting the request.

e. Assignment of Judge. The proceeding shall be assigned to the sentencing judge where possible. If it appears that the

sentencing judge's testimony will be relevant, that judge shall transfer the case to another judge.

f. Stay of Execution of Death Sentence; Notification by Supreme Court. If the defendant has received a sentence of death and the Supreme Court has fixed the time for execution of the sentence, no stay of execution shall be granted upon the filing of a second or subsequent petition except upon separate application for a stay to the Supreme Court, setting forth with particularity those issues not precluded under Rule 32.2. The Clerk of the Supreme Court shall notify the defendant, the Attorney General, and the Director of the State Department of Corrections of the granting of a stay.

Comment

Amendments to subsection (a) are to meet the requirements of Montgomery and State v. Pruett, 185 Ariz. 128, 912 P.2d 1357 (App. 1996). In Pruett, the court held that a pleading defendant is constitutionally entitled to effective assistance of counsel on the first petition for post-conviction relief, the counterpart to a direct appeal. Consequently, the rule is amended to allow the pleading defendant thirty days within which to file a second notice if the defendant seeks to challenge counsel's effectiveness in the first post-conviction relief proceeding.

Amendments to subsection (c) are to separate capital from non-capital cases. Paragraph (1) brings the rule in line with new

A.R.S. § 13-4041 and Rule 6.8 as adopted by the Supreme Court on October 22, 1996, effective November 1, 1996, requires notification to the Supreme Court if a petition is not filed within 180 days from the filing of the notice for post-conviction relief, and requires monthly status reports thereafter.

Paragraph (2) requires appointment of counsel in Montgomery cases, when requested, but makes all other appointments of counsel in non-capital cases discretionary. The paragraph adds language to permit counsel to comply with Lammie v. Barker, 185 Ariz. 263, 915 P.2d 662 (1996).

Subsection (d) is amended to substitute "transcripts" for "record", provides for expeditious review of a request for transcripts, allows the court to limit transcripts to those deemed necessary to resolve the issues to be raised, and prescribes a time limit for preparation of transcripts. This is consistent with the holding in Wilson v. Ellis, 176 Ariz. 121, 859 P.2d 744 (1993).

Rule 32.5. Contents of petition.

The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, ~~and verify under oath that he or she has done so.~~ Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other

evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required. In Rule 32 of-right and non-capital cases, the petition shall not exceed 25 pages. The response shall not exceed 25 pages, and any reply shall not exceed 10 pages. In capital cases, the petition shall not exceed 40 pages. The response shall not exceed 40 pages, and any reply shall not exceed 20 pages. An incomplete petition which fails to comply with this rule shall be returned by the court to the defendant for completion with a minute entry specifying how the petition is incomplete. The petition shall be returned by the defendant for refiling within 30 days after defendant's receipt of the incomplete petition. If the petition is not so returned, the court shall dismiss the petition proceedings with prejudice. The period for response by the state shall begin on the date a returned petition is refiled.

Comment

The amendments prescribe page limitations for petitions for post-conviction relief in all cases. They provide that, where a defendant's non-complying petition has been returned to him and he has not refiled a petition which complies with the rules within 30 days, the court shall dismiss the proceedings with prejudice.

Rule 32.6. Additional pleadings; summary disposition; amendments

a. Prosecutor's Response. Forty-five days after the filing of the petition, the state shall file with the court and send to the defendant or counsel for the defendant, a response. Affidavits, records or other evidence available to the state contradicting the allegations of the petition shall be attached to it. On a showing of good cause, the state may be granted a thirty day extension to file a response. Additional extensions shall be granted only ~~in~~ upon a showing of extraordinary circumstances.

b. Defendant's Reply. Within fifteen days after receipt of the response, the defendant may file a reply. Extensions shall be granted only ~~in~~ upon a showing of extraordinary circumstances.

c. Summary Disposition. The court shall review the petition within twenty days after the defendant's reply was due. On reviewing the petition, response, reply, files and records, and disregarding defects of form, the court shall identify all claims that are procedurally precluded under this rule. If the court, after identifying all precluded claims, determines that no remaining claim presents a material issue of fact or law which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed. If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law. If a hearing is ordered, the state shall notify the victims, upon the victims'

request pursuant to statute or court rule relating to victims' rights, of the time and place of the hearing.

d. Amendment of Pleadings. After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

Comment

The amendments to subsections (a) and (b) clarify that the appropriate party must make a showing of extraordinary circumstances to be granted an extension of time to file pleadings. This does not preclude the court from reviewing the petition on its own initiative.

Rule 32.7. Informal conference.

The court may at any time hold an informal conference to expedite the proceeding. The defendant need not be present if the defendant is represented by counsel who is present.

Rule 32.8. Evidentiary hearing.

a. Plenary Evidentiary Hearing. The defendant shall be entitled to a hearing to determine issues of material fact, with the right to be present and to subpoena witnesses. If facilities are available, the court may, in its discretion, order the hearing to be held at the place where the defendant is confined, giving at least 15 days notice to the officer in charge of the confinement

facility. In superior court, a complete record of the hearing shall be made.

b. Evidence. The rules of evidence applicable in criminal proceedings shall apply, except that the defendant may be called to testify at the hearing.

c. Burden of Proof. The defendant shall have the burden of proving the allegations of fact by a preponderance of the evidence. If a constitutional defect is proven, the state shall have the burden of proving that the defect was harmless beyond a reasonable doubt.

d. Decision. The court shall rule within 10 days after the hearing ends except in extraordinary circumstances where the volume of the evidence or the complexity of the issues require additional time. If the court finds in favor of the defendant, it shall enter an appropriate order with respect to the conviction, sentence or detention, any further proceedings, including a new trial and conditions of release, and other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law relating to each issue presented.

e. Transcript. The court may, and shall upon request of a party within the time limit for filing a petition for review, order that a transcript of the evidentiary hearing be prepared. The preparation of the evidentiary hearing transcript shall be at county expense if the defendant is indigent.

Comment

The heading of subsection (a) is changed from "Plenary" to "Evidentiary."

Subsection (e) clarifies that a party is entitled to a transcript of any evidentiary hearing held pursuant to this rule and that preparation of the transcript shall be at county expense if the defendant is indigent.

Rule 32.9 Review

a. Motion for Rehearing; Response; Reply. Any party aggrieved by a final decision of the trial court in these proceedings may, within fifteen days after the ruling of the court, move the court for a rehearing setting forth in detail the grounds wherein it is believed the court erred. No response to a motion for rehearing will be filed unless requested by the court, but a motion for rehearing will not be granted in the absence of such a response. ~~Any response shall be filed within fifteen days after service of such motion upon the adverse party.~~ A reply, if any, shall be filed within 10 days after the service of the response. The filing of a motion for rehearing in the trial court is not a prerequisite to the filing of a petition for review pursuant to paragraph (c) of this rule.

b. Disposition When Motion Granted. If the motion for rehearing is granted, the court may either (1) amend its previous

ruling without a hearing, or (2) grant a new hearing and then either amend or reaffirm its previous ruling. In either case, if the court amends its previous ruling, it shall set forth its reasons for amending the previous ruling. The state shall notify the victim, upon request, of any action taken by the court.

c. Petition for Review. Within thirty days after the final decision of the trial court on the petition for post-conviction relief or the motion for rehearing, any party aggrieved may petition the appropriate appellate court for review of the actions of the trial court. A cross-petition for review may be filed within 15 days after service of a petition for review. The petition for review, cross-petition and all responsive pleadings filed pursuant to this rule shall be filed in the appellate court. The petitioner and cross-petitioner, if any, shall file a notice of such filing with the trial court. Motions for extensions of time to file petitions or cross-petitions shall be filed in and ruled upon by the trial court. All other motions shall be filed in the court in which the petition is to be filed.

1. Form and Contents. The petition or cross-petition for review shall be typewritten in pica type and must be double-spaced. They shall be on paper 8.5 by 11 inches and contain a caption setting forth 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 side margins

must be at least 1 inch, and the top and bottom margins must be at least 1 and 1/4 inch. The bottom margin shall be measured to the bottom of the text of footnote. Quotations may be single-spaced. The paper must be white, opaque, unglazed paper. An original and 6 copies of the petition and an original and one copy of the appendix, if any, shall be filed if review is being sought in the Supreme Court. An original and 4 copies of the petition and an original and one copy of the appendix, if any, shall be filed if review is being sought in the Court of Appeals. An original and one copy shall be filed if review ~~of a petition filed in a limited jurisdiction court~~ is being sought in the superior court. The parties shall be designated as in the trial court proceedings. The petition or cross-petition shall not exceed 20 pages, exclusive of the appendix, shall not have a cover or be bound, but shall be fastened with a single staple in the upper left corner, and shall contain ~~concise statements of~~ the following:

(i) ~~A synopsis of the trial court's ruling or rulings.~~ Copies of the trial court's rulings entered pursuant to rules 32.6(c), 32.8(d) and 32.9(b) shall be attached to the petition or cross-petition.

(ii) The issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review.

(iii) The facts material to a consideration of the issues presented for review.

(iv) The reasons why the petition should be granted.

In capital cases All references to the record in the trial court shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices. If the appendices exclusive of the trial court's rulings exceed 15 pages in length, such appendices shall be fastened together separately from the petition and the copies of the trial court's rulings.

In Rule 32 of-right and non-capital cases, an appendix is not required, but the petition for review shall contain specific references to the record.

The filing of a motion for rehearing pursuant to paragraph (a) of this rule does not limit the issues that may be raised in the petition or the cross-petition for review. Failure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue.

2. Service; Response; Reply. The petitioner or cross-petitioner shall serve a copy of the petition or cross-petition on the adverse party. A response may be filed within 30 days from the date upon which the petition or

relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings filed and all minute entry orders issued in the post-conviction proceedings, plus the reporter's transcript and any exhibits admitted by the trial court in the post-conviction proceedings.

f. Disposition When Petition Granted. The Appellate Court may, in its discretion, grant review and may order oral argument upon the petition if deemed necessary and may issue such orders and grant such relief as it deems necessary and proper. The state shall notify the victim, upon request, of any action taken by the appellate court.

g. Reconsideration and Review of Appellate Court Decision. The provisions governing the filing of motions for reconsideration and petitions for review in criminal appeals set forth in Rules 31.18 and 31.19 shall apply to and govern motions for reconsideration and petitions for review of an appellate court decision entered pursuant to Rule 32.

h. Return of the Record. In Rule 32 of-right-and non-capital cases, Wwhen the matter is determined, the clerk of the appellate court shall return the record to the appropriate trial court for retention according to law. In capital cases, the clerk of the appellate court shall return any exhibits to the appropriate trial court.

Comment

Subsection (a) is amended to provide that no response to a motion for rehearing is to be filed unless requested by the court.

Subsection (c) changes the place of filing a petition for review to the appropriate appellate court and requires the petitioner to file a notice of such filing with the superior court. It allows the trial court to rule on motions for extensions of time for filing, but prescribes that the appellate court will rule on motions for additional pagination. This procedure is deemed advisable to achieve uniformity - some trial judges grant additional pagination, some do not - while not burdening the appellate court with motions for extension of time which the trial courts may have a better handle on, e.g., extension may be necessary due to lack of transcripts from that judge's court.

Paragraph (1) changes the form of caption to the appellate court because the petition for review will be filed in that court. It provides that petitions for review are not to have covers or bindings.

Subparagraph (i) eliminates the need for a synopsis of the trial court's rulings.

Subsection (c) also removes the requirement for appendices in non-capital cases.

Subsection (e) retains the requirement for filing the record in non-capital cases, but provides that the record is not to be

transmitted in capital cases unless requested by the appellate court.

Subsection (h) provides for different procedures for returning the record in capital and non-capital cases.

APPENDIX B

Form 24(c). (Amended) Notice Of Post-conviction Relief

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF _____

STATE OF ARIZONA,)	
)	No. CR-_____
Plaintiff,)	
)	NOTICE OF POST-CONVICTION
v.)	RELIEF
)	
_____,')	
)	
Defendant.)	
_____)	

Instructions: When the notice is complete, file it with the clerk of the superior court of the county in which the conviction occurred.

A person unable to pay costs of this proceeding and to obtain the services of a lawyer without substantial personal or family hardship should indicate this by requesting counsel in Question 6 of this notice and execute the AFFIDAVIT OF INDIGENCY on page 3. In the event an attorney is not appointed, a Request for Preparation of Post-Conviction Relief Record form must be filed by the defendant if some portion of the record is needed and has not previously been obtained.

NO ISSUE WHICH HAS ALREADY BEEN RAISED AND DECIDED ON APPEAL OR IN A PREVIOUS PETITION FOR POST-CONVICTION RELIEF MAY BE USED AS A BASIS FOR A SUCCESSIVE PETITION FOR POST-CONVICTION RELIEF.

1. Defendant's Name and prison number (if any): _____

2. Defendant's address: _____

3. (A) Defendant was convicted of the following crimes: _____

- (B) Defendant was sentenced on _____, 19____, to a term of _____, commencing on _____, 19____, following a
~~[] Trial by Jury [] Trial by a Judge without a Jury~~

Trial by: [] Jury [] Judge without a Jury
~~[] Plea of Guilty [] Plea of No Contest~~
Plea of: [] Guilty [] No Contest
Probation Revocation: [] Admission [] Violation Hearing

in the Superior Court of _____ County with
Judge _____ presiding.

(C) The file number of the case was CR-_____.

4. Defendant has taken the following actions to secure relief from his convictions or sentences:

(A) Direct Appeal: []Yes []No

(B) Previous Rule 32 Proceedings: []Yes []No

5. Defendant was represented by the following lawyers at:
(provide name of counsel and counsel's address, if known)

Trial or change of plea: _____

Sentencing hearing: _____

Appeal (if any): _____

Previous Rule 32 proceedings (if any): _____

6. Defendant is presently represented by a lawyer. []Yes []No
(If yes, provide name and address.)

If no, does the defendant request the court to appoint a lawyer for this proceeding? []Yes []No.

7. Respond to this section only if this is an untimely notice or the defendant requests counsel and has filed a previous Rule 32 petition in this case.

I AM REQUESTING POST-CONVICTION RELIEF. I UNDERSTAND THAT I MUST INCLUDE IN MY PETITION EVERY GROUND FOR RELIEF WHICH IS KNOWN AND WHICH HAS NOT BEEN RAISED AND DECIDED PREVIOUSLY. I ALSO UNDERSTAND THAT FAILURE TO RAISE ANY KNOWN GROUND FOR RELIEF IN MY PETITION WILL PROHIBIT ME FROM RAISING IT AT ANY FUTURE DATE.

Date

Defendant

AFFIDAVIT OF INDIGENCY

I have requested the appointment of a lawyer to represent me in Question 6. I swear under oath and penalty of perjury that I am indigent and because of my poverty I am financially unable to pay for the cost of a lawyer to represent me without incurring substantial hardship to myself or my family.

Defendant

Subscribed and sworn to before me on _____
(date)

My Commission Expires

Notary Public

RULE 28 COMMENT DISTRIBUTION LIST

R. 9/27/99

for R-97-0006

DESIGNATED BY RULE 28:

TO:

Petitioner Hon. Ronald S. Reinstein
Hon. Jane D. Hull, Governor, State of Arizona
Hon. Jeffrey S. Groscost, Speaker, Arizona House of Representatives
Hon. Brenda Burns, President, Arizona State Senate
Michael E. Braun, Executive Director, Arizona Legislative Council
Hon. Janet A. Napolitano, Attorney General
Patricia White, Dean, Arizona State University, College of Law
Toni M. Massaro, Dean, University of Arizona
Dave Byers, Admin Director, Administrative Office of the Courts
Glen D. Clark, Clerk, Court of Appeals, Division One
Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two
Executive Director, State Bar of Arizona
Hon. Sherry L. Geisler, President, Justice of the Peace Association
Hon. Tom C. Cole, President, Arizona Judges Association
Patricia Horgan, Executive Director, Arizona Attorneys for Criminal Justice
Edwin M. Cook, Exec Dir, AZ Prosecuting Attorney's Advisory Council
Sue Hall, President, Superior Court Clerk's Association
Janice Goldstein, Executive Director, Arizona Trial Lawyers Association
Thomas P. Burke, II, President, Arizona Association of Defense Counsel
Judy A. Ferguson, President, Arizona Magistrates Association
Laura V. MacBan, President, Tucson Defense Bar Association
Code-Co Law Publishers
Editor, Arizona Attorney
Editor, Maricopa Lawyer
Editor, The Writ

COURT OF APPEALS PRESIDING JUDGES:

Hon. E.G. Noyes, Chief Judge, Court of Appeals, Division One
Hon. Philip G. Espinosa, Chief Judge, Court of Appeals, Division Two

SUPERIOR COURT PRESIDING JUDGES:

Apache County
Cochise County
Coconino County
Gila County
Graham County
Greenlee County
La Paz County
Maricopa County
Mohave County
Navajo County
Pima County
Pinal County
Santa Cruz County
Yavapai County
Yuma County

BAR ASSOCIATION PRESIDENTS:

Apache County - Bryce Patterson
Cochise County - Patrick Ledger
Coconino County - Deborah M. Fine
Gila County - Jefferson R. Dalton
Graham-Greenlee County - Jack M. Williams
Maricopa County - Heidi McNeil Staudenmaier
Mohave County - Dolores H. Milkie
Navajo-Apache County - Katharine Taber
Pima County - Peter Akmajian
Pinal County - April Elliott
Santa Cruz County - Saji Vettiyil
Yavapai County - Bruce Rosenberg
Yuma County - Joshua Meyer
East Valley - Jeffrey Crockett
Scottsdale - Christine Pesticci
West Maricopa - James McGreevy

COUNTY PUBLIC DEFENDER DESIGNATED BY THE COURT:

Cochise County - Mark A. Suagee
Coconino County - H. Allen Gerhardt
La Paz County - Michael J. Burke
Maricopa County - Dean W. Trebesch
Mohave County - Kenneth D. Everett
Navajo County - Myrna Parker
Pima County - Susan A. Kettlewell
Pinal County - Michael F. Beers
City of Phoenix - John W. Rood III
Yuma County - Ronald F. Jones

LEGAL DEFENDERS DESIGNATED BY THE COURT:

Cochise County - James G. White
Maricopa County - Robert S. Briney
Maricopa County Office of Court Appointed Counsel
Mohave County - Gerald Gavin
Navajo County Alternative Defender - Dale P. Nielson
Pima County - Isabel Garcia de Romo

LAW LIBRARIES:

Apache County
Cochise County
Coconino County
Gila County
Graham County
Greenlee County
La Paz County
Maricopa County
Maricopa County-Southeast Branch
Mohave County
Navajo County

Pima County
Pinal County
Santa Cruz County
Yavapai County
Yuma County

OTHERS:

SPECIFIC INDIVIDUALS DESIGNATED BY THE COURT:

Carolyne K. Bass, Executive Director, Pima County Bar Association
Scott Bales, Solicitor General, Arizona Attorney General's Office
Shirley Wahl, Chair, Civil Practice & Procedures Committee
Hon. B. Robert Dorfman, Chief Presiding Judge, Phoenix Municipal Ct
Jennifer Might, Administrator, Arizona Capital Representation Project
Supreme Court Justices
Staff Attorneys
Press Folders

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Attachment B

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SEP - 7 2001

R-01-0015

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CLERK SUPREME COURT
JANET NAPOLITANO
Arizona Attorney General
(Firm State Bar No. 14000)
1275 W. Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

FILED
SEP 07 2001
NOEL K. DESSAINT
CLERK SUPREME COURT
BY *NS*

**IN THE SUPREME COURT
OF THE STATE OF ARIZONA**

In the Matter of PETITION TO AMEND
RULES 8.4(a), 32.1(h), and 32.2, ARIZONA
RULES OF CRIMINAL PROCEDURE

SUPREME COURT
No. R-

**PETITION TO AMEND RULES OF
CRIMINAL PROCEDURE**

Pursuant to Rule 28 of the Rules of the Supreme Court of Arizona, Attorney General Janet Napolitano requests this Court to amend Rule 8.4(a), Rule 32.1(h), and the Comment to Rule 32.2, Arizona Rules of Criminal Procedure. A summary of the proposed changes and the grounds for adopting the changes are set forth in section I below, and a draft of the proposed amended Rules is set forth in section II below.

I. Summary of Proposed Changes

A. Rule 8.4(a): Speedy Trial Rights.

Rule 8.4(a), Arizona Rules of Criminal Procedure, excludes certain periods of time from the calculation governing the defendant's speedy trial rights. The proposed amendment conforms subsection (a) to recently-enacted legislation addressing mentally retarded capital defendants, A.R.S. § 13-703.02, and excludes time for an examination or hearing to determine whether the defendant is mentally retarded.

1 **B. Rule 32.1(h): Claims of Actual Innocence.**

2 Rule 32.1(h), Arizona Rules of Criminal Procedure, was recently added to the Rules to allow
3 defendants to raise claims of actual innocence in post-conviction relief proceedings even when the
4 claims are not based on evidence that qualifies as “newly discovered” under Rule 32.1(e). The
5 Rule and Comment currently appear to allow defendants to urge virtually any claim challenging
6 the determination of guilt or the imposition of death. The proposed amendments to the Rule and
7 Comment clarify that subsection (h) is intended only to allow claims of actual innocence that are
8 supported by reliable scientific evidence that has never previously been presented to the jury or
9 the court.

10 The proposed amendment also limits the application of subsection (h) to claims relating to
11 guilt. This clarification is necessary to avoid an endless procession of claims regarding alleged
12 mitigation evidence. The proposed amendment does not eliminate the availability of sentencing
13 claims if the current provision for introducing newly-discovered evidence is satisfied.

14 **C. Rule 32.2: Preclusion in Post-Conviction Relief Proceedings.**

15 Rule 32.2, Arizona Rules of Criminal Procedure, governs the preclusion of post-conviction
16 relief for certain claims. The proposed amendment to the Comment addresses a question raised
17 by a recent Ninth Circuit ruling regarding whether the 1992 changes to Rule 32.2 altered the way
18 in which Arizona courts review precluded claims. In *Smith v. Stewart*, 241 F.3d 1191 (9th Cir.
19 2001), The Ninth Circuit ruled that the 1992 changes to Rule 32.2 now require Arizona courts to
20 review the merits of precluded claims before applying the rules of preclusion. The Ninth Circuit
21 has ruled that under the pre-1992 version of Rule 32.2, Arizona courts were not required to review
22 the merits of precluded claims before finding deciding whether they were precluded. *See Poland*
23 *v. Stewart*, 169 F.3d 573, 578 (9th Cir. 1999). The significance of the ruling in *Smith* is that it will
24 lengthen (if not prolong indefinitely) the already lengthy federal appeals process, because federal
25 courts considering a petition for writ of habeas corpus following a state court conviction are only
26 permitted to review claims that have been properly presented to the state courts. If, for example,
27 a defendant does not raise a claim at trial, on direct appeal, or in a post-conviction proceeding in
28 state court, under the *Poland* ruling interpreting the pre-1992 version of Rule 32.2, the federal

1 courts would not consider such a claim because it was not properly presented to the state courts.
2 Under the *Smith* ruling interpreting the post-1992 version of Rule 32.2, the federal courts can
3 consider the merits of the claim even though it has never been developed in state courts.
4 Furthermore, under *Smith*, extensive evidentiary hearings may be necessary to develop claims that
5 were found to be precluded in state court without an evidentiary hearing having been conducted.

6 The *Smith* decision misinterprets the 1992 changes to Rule 32.2. The pre-1992 version of
7 the Rule provided that a claim would be precluded in a post-conviction proceeding if the defendant
8 “knowingly, voluntarily and intelligently” decided not to raise an issue at trial, on appeal, or in a
9 previous post-conviction proceeding. The 1992 changes to the Rule eliminated the “knowing,
10 voluntary, and intelligent waiver” requirement, and preclusion is now conditioned only on whether
11 an issue has been waived at trial, on appeal, or in a collateral proceeding. The Ninth Circuit’s
12 assumption in *Smith* that the 1992 changes to Rule 32.2 benefit the defendant is ironic because that
13 the 1992 amendment to Rule 32.2 was proposed by the Arizona Attorney General’s Office and in
14 fact operates to make it *more difficult* for a defendant to avoid preclusion.

15 In *Smith*, the Ninth Circuit did not suggest that the changes to the language of Rule 32.2
16 compelled the conclusion that Arizona courts now review the merits of all precluded claims. The
17 Ninth Circuit instead focused on the following language in the *Comment* to the 1992 version of
18 the Rule:

19 The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must “knowingly,
20 voluntarily and intelligently” not raise an issue at trial, on appeal, or in a previous
21 collateral proceeding before the issue was precluded. While that is the correct standard
22 of waiver for some constitutional rights, it is not the correct standard for other trial
23 errors. Accordingly, some issues not raised at trial, on appeal, or in a previous
24 collateral proceeding may be deemed waived without considering the defendant’s
25 personal knowledge, unless such knowledge is specifically required to waive the
26 constitutional right involved. If an asserted claim is of sufficient constitutional
27 magnitude, the state must show that the defendant “knowingly, voluntarily and
28 intelligently” waived the claim.

Contrary to the Ninth Circuit’s holding in *Smith*, the reference in the Comment to claims of
“sufficient constitutional magnitude” does not recognize any general exception to Arizona’s
procedural default rules. The Comment merely acknowledges that Arizona’s rules of preclusion
will not bar claims involving a narrow category of constitutional rights absent an on-the-record

1 personal waiver by the defendant. Once a personal waiver is shown, however, the normal rules
2 of preclusion apply. If, for example, a defendant avows to the trial court prior to trial that he is
3 knowingly, voluntarily, and intelligently waiving his right to counsel, and the trial court accepts
4 the avowal, the normal rules of preclusion will apply if the defendant subsequently tries to pursue
5 a post-conviction claim that he was denied his right to counsel. Thus, the state courts' analysis
6 of whether a claim is part of a "narrow category of constitutional rights" is not an assessment of
7 the merits or the "constitutional magnitude" of the claim, but rather an assessment of whether the
8 claim is one that requires an affirmative waiver on the record or one that the defendant's counsel
9 can waive by inaction.

10 The Arizona Court of Appeals employed this analysis of Rule 32.2 and the current Comment
11 in *State v. Espinosa*, 2001 WL 870025 (Ct. App. July 31, 2001). In *Espinosa*, the court expressly
12 interpreted Rule 32.2 and its Comment contrary to the decision in *Smith*. The court explained:

13 [P]reclusion does not apply to claims involving certain constitutional rights unless the
14 record shows that the defendant knowingly, voluntary , and intelligently waived the
15 right. "If an asserted claim is of sufficient constitutional magnitude, the sate must show
16 that the defendant 'knowingly, voluntarily, and intelligently' waived the claim." Cmt.,
17 Ariz. R. Crim. P. 32.2(a)(3). Thus, preclusion would not apply to claims involving
18 such constitutional rights as the right to counsel, the right to a jury trial, or the right to
19 be tried by a 12-person jury, unless the record establishes that the defendant has
20 knowingly, voluntarily, and intelligently waived the right. And, conversely, if the
21 claim implicates a less significant constitutional right, preclusion applies even without
22 a showing that the defendant knowingly, voluntarily, and intelligently waived the right.
23 In other words, "the state may simply shows that the defendant did not raise the error
24 at trial[, on appeal, or in a previous collateral proceeding,] and that would be sufficient
25 to show that the defendant has waived the claim." Cmt., Ariz. R. Crim. P. 32.2(a)(3).

26 2001 WL 870025, ¶ 6. Thus, the inquiry the court makes under Rule 32.2 is limited to determining
27 which type of constitutional claim is implicated—one that requires a knowing, voluntary, and
28 intelligent personal waiver by the defendant or one that does not. That inquiry does not involve
a review of the constitutional claim on the merits. In *Espinosa*, for example, the court concluded
that the defendant's claims of a due process violation and a violation of Arizona's Distribution of
Powers Clause are in the latter category, and in no way analyzed the merits of the claims in doing
so.

Additionally, the Attorney General recommends striking and replacing the entire Comment.
The current Comment is a compilation of all the previous comments to the Rule, and thus contains

1 outdated and incorrect legal principles. The proposed amended Comment incorporates the more
2 recent, accurate amendments to the existing Comment and eliminates language referring to federal
3 law that has long since been changed.

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1 **II. Text of Proposed Rule Changes**

2 **A. Rule 8.4(a), Arizona Rules of Criminal Procedure:**

3 a. Delays occasioned by or on behalf of the defendant, including, but not limited
4 to, delays caused by an examination and hearing to determine competency OR
5 MENTAL RETARDATION, the defendant's absence or incompetency, or his or her
6 inability to be arrested or taken into custody in Arizona.

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1 **B. Rule 32.1(h), Arizona Rules of Criminal Procedure:**

2 h. The defendant demonstrates by clear and convincing RELIABLE
3 SCIENTIFIC EVIDENCE NOT PREVIOUSLY CONSIDERED BY A COURT
4 OR JURY that the facts underlying the claim would be sufficient to establish that
5 no reasonable fact-finder would have found defendant guilty of the underlying
6 offense beyond a reasonable doubt. ~~or that the court would not have imposed the
7 death penalty.~~

8 **Comment**

9 **General.** Under previous Arizona procedure, there were seven avenues for
10 post-conviction relief: appeal, federal *habeas corpus*, Arizona *habeas corpus*, writ of
11 *coram nobis*, motion for new trial or newly discovered evidence, motion to modify or
12 vacate judgment (under Civil Rule 60(c)), and delayed appeal. Each had different
13 mechanics, requirements and time limits. The unified procedure of Rule 32:

- 14 (1) Consolidates the last five avenues into a single comprehensive remedy;
15 (2) Requires, subject to a limited exception, the consolidation of all claims in a
16 single petition;
17 (3) Permits summary dismissal of frivolous claims;
18 (4) *Provides* for a full-scale evidentiary hearing on the record in order to limit
19 federal *habeas corpus* review to questions of law, *Townsend v. Sain*, 83 S.Ct. 745, 372
20 U.S. 293, 9 L.Ed.2d 770 (1963); and
21 (5) Allows filing of petitions for post-conviction relief in the court in which the
22 judgment and sentence were rendered.

23 **Rule 32.1.** This rule catalogs the possible grounds for relief. It is based upon
24 Rule 35 of the Alaska Rules of Criminal Procedure and incorporates the essence of
25 ABA, Standards Relating to Post-Conviction Remedies (Approved Draft, 1968)
26 [hereinafter cited in comments to Rule 32 as ABA, Standards] within the drafting
27 structure of the second Revised Uniform Post-Conviction Procedure Act (1966)
28 [hereinafter cited in comments to Rule 32 as Uniform Act]. It is intended that this rule
encompass all the grounds presently available in Arizona under a writ of *habeas
corpus*, Ariz.Const. Art. 2, § 14; Ariz.Rev.Stat. Ann. §§ 13-2001 to 13-2027 (1956)
[renumbered]; a writ of *coram nobis*, Ariz.Const. Art. 6, § 5 (Cum.Supp.1972), e.g.,
State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), *certiorari denied* 87 S.Ct. 784,
385 U.S. 1043, 17 L.Ed.2d 687 (1967); a motion for a new trial on newly-discovered
evidence, 1956 Arizona Rules of Criminal Procedure, Rule 310(3); a motion filed
under Ariz.R.Civ.P. 60(c); a motion for delayed appeal, Ariz.Sup.Ct.R. 16(a); plus
those available under federal *habeas corpus* procedures, 28 U.S.C. § 2241(c) (1970).
The available grounds are detailed in order to notify prisoners, and the federal courts,
of the availability of relief, see *Case v. Nebraska*, 85 S.Ct. 1486, 381 U.S. 336, 14
L.Ed.2d 422 (1965), to encourage the consolidation of all grounds for relief in a single
petition and to justify the preclusion of claims not so raised. See Rule 32.2. These
same purposes are served by the detailed checklist of grounds contained in the
proposed form. See comment to Rule 32.4(a) and Form XXV.

With the exception of paragraph (d), no showing of any form of custody is
required as a precondition for relief, thereby eliminating, in large part, one aspect of
federal and state *habeas corpus* law. See, e.g., *Peyton v. Rowe*, 88 S.Ct. 1549, 391
U.S. 54, 20 L.Ed.2d 426 (1968).

No filing fee is required in accordance with Ariz.Rev.Stat. Ann. § 13-2023 (1956)
[renumbered] which prohibits the charging of a fee in *habeas corpus* proceedings.

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

3 **Rule 32.1(b).** Paragraph (b) retains the basic attack on jurisdiction universally
4 recognized as a ground for collateral attack. See ABA, Standards, *supra*, at §
2.1(a)(iii).

5 **Rule 32.1(c).** This provision follows ABA, Standards, *supra*, at § 2.1(a)(iv). See
6 also Uniform Act, *supra*, at § 1(a)(3). It is intended to allow an attack on a sentence
even though the petitioner does not contest the validity of the underlying conviction.

7 **Rule 32.1(d).** This paragraph is not intended to include attacks on the conditions
8 of imprisonment or on correctional practices or prison rules.

9 Paragraph (d) is intended to include claims of more traditional types--e.g.,
10 miscalculation of sentence, questions of computation of good time--which result in the
defendant's remaining in custody when he should be free. Appeals from the conviction
11 and imposition of probation must be filed within 20 days of the entry of judgment and
sentence. See Rules 31.3, 26.1(b) and 26.16(a).

12 **Rule 32.1(e).** Paragraph (e) replaces the 1956 Arizona Rules of Criminal
13 Procedure, Rule 310(3). The rule reduces the requirements of the 1956 Arizona Rules
of Criminal Procedure, Rule 310(3) from absolute preconditions for relief to factors for
14 the court to weigh in deciding whether or not a new trial is justified. See Wexler &
Silverman, Representing Prison Inmates: A Primer on an Emerging Dimension of
15 Poverty Law Practice, 11 Ariz.L.Rev. 385, 400-04 (1969) [hereinafter cited in
comments to Rule 32 as Wexler & Silverman].

16 Subparagraph (e)(3) substitutes for the 1-year limit of the 1956 Arizona Rules of
17 Criminal Procedure, Rule 308, a requirement that the judge take into consideration the
prisoner's promptness in bringing forth new evidence. This provision will prevent
18 abuse of process, *e.g.*, a prisoner's lying-in-wait until an essential prosecution witness
dies, but avoids setting a specific time limit.

19 **Rule 32.1(f).** This provision is based on Ariz.Sup.Ct.R. 16(a). The scope is
20 intended to be the same as that of the present rule. It includes the situation in which
the defendant fails to appeal because the trial court, despite the requirements of Rule
21 26.11, did not advise him of his appeal rights, and the situation in which the defendant
intended to appeal and though timely appeal had been filed by his attorney when in
22 reality it had not. See 31.3; see generally Wexler and Silverman, *supra*, at 397-400;
e.g., *In re Acosta*, 97 Ariz. 333, 400 P.2d 328 (1965).

23 The delayed appeal procedure is retained to provide a remedy in those cases in
24 which the grounds to be raised on appeal are not appropriate for a collateral attack on
the conviction--*e.g.*, nonconstitutional errors in the conduct of the trial. Moreover, the
25 delayed appeal provision preserves the defendant's right to a general review of the
record for fundamental error where his failure to file a timely appeal was not his fault.
26 See Arizona Rev.Stat. Ann. § 13-1715(B) (1956) [now § 13-4035]; *Anders v.*
California, 87 S.Ct. 1396, 386 U.S. 738, 18 L.Ed.2d 493 (1967), rehearing denied 87
S.Ct. 2094, 388 U.S. 924, 18 L.Ed.2d 1377.

27 **Rule 32.1(g).** Paragraph (g) encompasses all claims for retroactive application
28 of new constitutional and nonconstitutional legal principles. The language is based
upon ABA, Standards, *supra*, at § 2.1(a)(vi).

1 **Comment to Rule 32.1(e) [1992 Amendment]**

2 Impeachment evidence will rarely be of a type which would probably have
3 changed the verdict at trial. However, where newly-discovered impeachment evidence
4 substantially undermines testimony which was of critical significance at trial, the court
5 should evaluate whether relief should be granted on the grounds that the evidence
6 probably would have changed the result. Dicta in cases such as *State v. Fisher*, 141
7 *Ariz.* 227, 250-51, 686 P.2d 750, cert. denied, 469 U.S. 1066, 105 S.Ct. 548, 83
8 *L.Ed.2d* 436 (1984), suggesting that a defendant will always be barred from relief if
9 newly-discovered evidence is solely for impeachment, have never been incorporated
10 into the Arizona Rules of Criminal Procedure and should not preclude relief deemed
11 necessary in the court's discretion to avoid a miscarriage of justice.

12 **Comment [2000 Amendment]**

13 Changes in the first and second paragraphs and in subsection (f) are to meet and
14 accommodate the requirements of *Montgomery v. Sheldon*, 181 *Ariz.* 256, 889 P.2d
15 614 (1995) (opinion supplemented, 182 *Ariz.* 118, 893 P.2d 1281), and its progeny. A
16 petition when authorized under *Montgomery* is referred to in the above provision as an
17 "of-right" proceeding. Relief pursuant to subsection (f) will continue to be unavailable
18 to all post-conviction relief proceedings not "of-right". See *Moreno v. Gonzalez*, 192
19 *Ariz.* 131, 962 P.2d 205 (1998).

20 ~~— The addition of new subparagraph (h) is warranted by the U.S. Supreme Court's
21 pronouncement that claims of actual innocence are not cognizable under the federal
22 habeas corpus remedy. *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853 (1993). This
23 claim is independent of a claim under subparagraph (e). A defendant who establishes
24 a claim of newly discovered evidence does not need to comply with the requirements
25 of subparagraph (h).~~

26 In approving the 2000 amendments to Rule 32, the Arizona Supreme Court did
27 not have the benefit of the comments of a statewide commission which was empaneled
28 that year by the Attorney General of Arizona to investigate and assess the
administration of the death penalty in the State of Arizona. Accordingly, further
amendments to Rule 32 may be necessary following the issuance of that commissions'
recommendations. In particular, the topics of deadlines and time periods and victims'
rights may need to be addressed at that time.

COMMENT TO RULE 32.1(H) [2001 AMENDMENT]

SUBSECTION (H) IS RESERVED FOR THE EXTRAORDINARY CASE IN WHICH JUSTICE HAS CLEARLY GONE AWRY. IT IS ONLY FOR CASES IN WHICH DNA EVIDENCE OR OTHER RELIABLE SCIENTIFIC EVIDENCE, ALTHOUGH NOT GROUNDS FOR RELIEF UNDER RULE 32.1(E) (NEWLY DISCOVERED EVIDENCE), ESTABLISHES INNOCENCE.

1 **RULE 32.2(B).** THIS PARAGRAPH EXEMPTS CERTAIN TYPES OF
2 CLAIMS FROM THE RULES OF PRECLUSION CONTAINED IN THIS RULE.
3 THE 2000 AMENDMENTS TO THIS PARAGRAPH ARE INTENDED TO
4 CONFORM TO RECENT STATUTORY CHANGES AND INCLUDE A
5 REQUIREMENT THAT A DEFENDANT SET FORTH THE SUBSTANCE OF THE
6 SPECIFIC EXCEPTION AND THE REASONS FOR NOT RAISING THE CLAIM
7 IN THE PREVIOUS PETITION OR IN A TIMELY MANNER. THE FAILURE TO
8 IDENTIFY THE SPECIFIC EXCEPTION WILL ALLOW FOR DISMISSAL
9 WITHOUT PREJUDICE ON THE NOTICE ALONE. ADDITIONALLY, THE
10 AMENDMENTS ADD A CLAIM OF ACTUAL INNOCENCE, MADE UNDER
11 RULE 32.1(H), AS AN EXCEPTION TO THE RULES OF PRECLUSION.

12 **RULE 32.2(C).** THIS PARAGRAPH REQUIRES THE STATE TO PROVE
13 PRECLUSION BY A PREPONDERANCE OF THE EVIDENCE. THE 2000
14 AMENDMENT, WHICH ADDS THAT A FINDING OF PRECLUSION MAY BE
15 MADE BY A REVIEWING COURT EVEN IF NOT RAISED BY THE STATE, IS
16 INTENDED TO CONFORM TO RECENT STATUTORY CHANGES.

17 **Comment**

18 In *Townsend v. Sain*, 83 S.Ct. 745, 372 U.S. 293, 9 L.Ed.2d 770 (1963), *Fay v.*
19 *Noia*, 83 S.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837 (1963), and *Henry v. State of*
20 *Mississippi*, 85 S.Ct. 564, 379 U.S. 443, 13 L.Ed.2d 408 (1965), rehearing denied 85
21 S.Ct. 878, 380 U.S. 926, 13 L.Ed.2d 813, on remand 253 Miss. 263, 174 So.2d 348,
22 motion denied 85 S.Ct. 1528, 381 U.S. 908, 14 L.Ed.2d 431, on remand 98 So.2d 213
23 the Supreme Court developed the following general approach: The federal courts will
24 indulge in only limited review of state court rulings on claims of deprivation of
25 federally-protected constitutional rights when those claims have been resolved on the
26 merits after an adequate fact-finding inquiry. However, they will undertake an
27 independent investigation when such claims have been denied on procedural grounds
28 and the petitioner has not "deliberately bypassed" or abused state procedures. While
the whole area is far from settled, it is fair to say that a federal court will honor a state
court's refusal to consider a constitutional claim where there has been a final appellate
or post-conviction determination on the merits after any necessary fact-finding
proceedings (and there appears no injustice in refusing to reopen the matter), or where
an issue has not been litigated due to the petitioner's conscious and knowing choice not
to raise it at a time when the state, for legitimate reasons, required it to be raised.

Rules 32.2(a), (c), and (d). Paragraphs (a)(1) and (2) preclude relief on petitions
based on matters already adjudicated in an appellate context or which still may be
considered by a trial or appellate court under Rules 24 (Post-Trial Motions) or 31
(Appeals from Superior Court). Rules 24.1, 24.2 and 24.3 give the trial court broad
authority to correct its own errors, obviating the need for appeal or post-conviction
petition.

 Paragraph (a)(3), together with sections (c) and (d), seeks to preclude petitions
on grounds purposefully not raised at trial, on appeal or on a previous petition, and
appeals purposely not filed within the time limit set by Rule 31.3. It incorporates the
federal standard for waiver of constitutional rights. *Johnson v. Zerbst*, 58 S.Ct. 1019,
304 U.S. 458, 82 L.Ed. 1461 (1938). A petitioner who has knowingly, voluntarily and
intelligently foregone the right to raise an issue at any stage of a criminal proceeding
will be precluded from later doing so by post-conviction petition.

 The question of whether counsel can waive a right of the defendant is a factual
question to be determined in each case. *Fay v. Noia*, supra, held that counsel cannot

1 waive a fundamental right of the defendant. *Henry v. Mississippi*, supra, at 451-53;
2 limited *Fay* to exceptional circumstances. Subsequent lower court cases have
3 interpreted *Henry* as creating a distinction between tactical decisions made during the
4 course of trial by counsel acting as manager of the case, and such fundamental
5 decisions as pleading guilty, waiving trial by jury, waiving a preliminary hearing, and
6 whether or not to appeal. See *Nelson v. People of State of California*, 346 F.2d 73 (9th
7 Cir.), certiorari denied 86 S.Ct. 452, 382 U.S. 964, 15 L.Ed.2d 367 (1965); *Whitus v.*
8 *Balkcom*, 333 F.2d 496 (5th Cir.), certiorari denied 85 S.Ct. 329, 379 U.S. 931, 13
9 L.Ed.2d 343 (1964); *People v. Williams*, 36 Ill.2d 194, 222 N.E.2d 321 (1966);
10 certiorari denied 87 S.Ct. 2126, 388 U.S. 923, 18 L.Ed.2d 1372 (1967). Judge
11 *Waterman* of the Second Circuit, lists 4 variables for determining whether waiver by
12 counsel may serve as a preclusion: (1) the nature of the right involved, (2) whether
13 counsel had a choice between meaningful alternatives and whether he deliberately
14 made that choice, (3) the opportunity for meaningful consultation with the accused, and
15 (4) the degree of external pressure. *United States ex rel. Bruno v. Herold*, 408 F.2d
16 125, 138-139 (2d Cir.1969) (dissenting opinion), certiorari denied 90 S.Ct. 947, 397
17 U.S. 957, 25 L.Ed.2d 141 (1970).

18 Section (c) creates an inference of knowing waiver when a person is warned of
19 the need to raise all issues, is given a full opportunity to raise them, and nevertheless
20 fails to do so. In the absence of evidence on the issue, the inference prevails. It may
21 be rebutted by evidence showing a lack of knowing, voluntary and intelligent waiver;
22 however, the inference does not "vanish" upon the introduction of rebuttal evidence;
23 but remains a part of the case. Under Rule 32.2(d) the prosecutor must sustain the
24 ultimate burden of proof on the issue of waiver on the whole of the evidence on the
25 issue which includes the inference.

26 The term "prosecutor" in section (d) and throughout this rule includes a county
27 attorney, a city attorney, or the attorney general, whichever is appropriate. It is the
28 intent of the rule that the office handling the prosecution on the trial level have primary
responsibility for handling Rule 32 petitions.

Rule 32.2(b). Section (b) exempts petitions based upon newly-discovered
material facts, miscalculation of sentence or a significant change of law from the
preclusion sanctions of Rule 32.2(a). A defendant cannot anticipate these grounds and
preclusion of them could not further the state's legitimate interest in consolidating all
known and knowable claims in a single petition.

Rule 32.2(c). This section is not intended to limit in any way the prosecutor's
power to establish waiver under the general standard of Rule 32.2(a)(3) in cases not
covered by the inference, e.g., previous post-conviction proceedings during which the
defendant was not represented by counsel. Failure to assert a ground for relief in a
post-trial motion does not trigger any of the preclusions.

Comment to Rule 32.2(a)(3)

The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must
"knowingly, voluntarily and intelligently" not raise an issue at trial, on appeal, or in a
previous collateral proceeding before the issue was precluded. See, *Faye v. Noya*, 372
U.S. 392 (1963). While that is the correct standard of waiver for some constitutional
rights, it is not the correct standard for other trial errors. Accordingly, some issues not
raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived
without considering the defendant's personal knowledge, unless such knowledge is
specifically required to waive the constitutional right involved. If an asserted claim is

1 of sufficient constitutional magnitude, the state must show that the defendant
2 "knowingly, voluntarily and intelligently" waived the claim. For most claims of trial
3 error, the state may simply show that the defendant did not raise the error at trial, on
4 appeal, or in a previous collateral proceeding, and that would be sufficient to show that
5 the defendant has waived the claim. If defense counsel's failure to raise an issue at
6 trial, on appeal or in a previous collateral proceedings is so egregious as to result in
7 prejudice as that term has been constitutionally defined, such failure may be raised by
8 means of a claim of ineffective assistance of counsel.

9 **Comment [2000 Amendment]**

10 Amendments to subsection (b) intended to conform to recent statutory changes
11 include a requirement that a defendant set forth the substance of the specific exception
12 and the reasons for not raising the claim in the previous petition or in a timely manner.
13 The failure to identify the specific exception will allow for dismissal without prejudice
14 on the notice alone. Additionally, the amendments add a claim of actual innocence as
15 an exception to preclusion.

16 Subsection (c) is amended to conform to recent statutory changes.

17 DATED this 7 day of September, 2001.

18 Respectfully submitted,

19 

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2
ST

Supreme Court

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October 15, 2001

RE: RULES 8.4(a), 32.1(h), and 32.2, AZ RULES OF CRIMINAL PROCEDURE
Arizona Supreme Court No. R-01-0015

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 09, 2001, in regard to the above-referenced cause:

ORDERED: Petition to Amend Rules of Criminal Procedure [Rules 8.4(a), 32.1(h) and 32.2, Arizona Rules of Criminal Procedure] = CIRCULATE for comment the proposals regarding speedy trial and preclusion. Comments due November 26, 2001.

FURTHER ORDERED: The proposal regarding an actual innocence provision = DENIED. Justice Martone voted to circulate the actual innocence proposal.

AN ORIGINAL AND SIX (6) COPIES OF ALL COMMENTS SHALL BE FILED WITH THE CLERK OF THE SUPREME COURT, 1501 WEST WASHINGTON ST., ROOM 402, PHOENIX, AZ 85007 IN AN ENVELOPE MARKED "RULE COMMENT".

ANY PERSON FILING A COMMENT SHALL SEND A COPY THEREOF TO PETITIONER.

Noel K. Dessaint, Clerk

TO:

Hon. Janet A. Napolitano, Arizona Attorney General
Rules Comment List

sls

Memorandum

To: Rule 32 task force
From: Lacey Gard
Date: July 30, 2018
Re: Proposal to modify Rule 32.1(h)

Rule 32.1(h) currently permits relief when “the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt, or that the death penalty would not have been imposed.” The Rule was designed to address claims of actual innocence. Ariz. R. Crim. P. 32.1(h), 2000 cmt. (“The addition of new subparagraph (h) is warranted by the U.S. Supreme Court’s pronouncement that claims of actual innocence are not cognizable under the federal habeas corpus remedy. *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993).”). Consistent with Rule 32.1(h)’s purpose, the State acknowledges that the Rule provides a basis for asserting that no reasonable fact-finder would have found the defendant in a capital case *eligible for* the death penalty, *i.e.*, that there is clear-and-convincing evidence that undermines the finding of aggravators underlying the death sentence.

The Rule, however, is problematic in many respects. *See State v. Miles*, 243 Ariz. 511, 518, ¶ 32 n.6 (2018) (Pelander, V.C.J., concurring) (“In my view, Rule 32.1(h) is a prime candidate for the [Rule 32] Task Force’s consideration.”). One concern, in particular, is whether the Rule creates a basis for asserting that additional mitigation that was not presented in a prior post-conviction proceeding can constitute clear-and-convincing evidence such that no reasonable sentencer would have imposed the death penalty. It is difficult, if not impossible, to hypothesize some type of additional mitigation evidence—that has not been presented in an initial post-conviction proceeding through a claim of ineffective assistance of counsel, or in a successive petition as “newly-discovered evidence” under Rule 32.1(e)—that would be so compelling that it could be said that no

reasonable fact-finder would have imposed the death penalty had it considered the additional mitigation.¹

Moreover, to the extent Rule 32.1(h) can be read as creating a basis for making such a claim, the Rule would improperly add substantive rights beyond those provided by statute or the federal and state Constitutions. Therefore, I propose amending the Rule to clarify that the death-penalty provision provides a basis for relief when:

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.~~

This proposal would clarify the rule and promote finality, while simultaneously retaining a defendant's ability to pursue meritorious claims of factual innocence and to challenge his death sentence under appropriately limited circumstances.

I. The Rule should expressly limit relief to situations in which a defendant proves by clear-and-convincing evidence that he is *ineligible* for the death penalty.

The language proposed above clarifies that Rule 32.1(h) is limited to circumstances in which a defendant is shown to be *ineligible* for the death penalty. *See* A.R.S. § 13-752 (establishing two-phase procedure for capital sentencing under which jury first finds defendant eligible for the death penalty by finding an aggravating factor in the aggravation phase, and second selects the appropriate

¹ Even without Rule 32.1(h), a defendant can assert (in a first post-conviction proceeding) a claim of ineffective assistance of sentencing counsel for failing to adequately present mitigation, and a defendant can assert (in a successive post-conviction proceeding) a claim based on newly-discovered evidence that could not previously have been discovered and presented in the initial Rule 32 proceeding.

sentence, based on defendant’s mitigation and State’s rebuttal evidence, in the penalty phase).

A. A broad reading of the current Rule causes separation of powers concerns.

The Legislature defined the scope of post-conviction relief in A.R.S. § 13–4231, and specified only seven grounds for relief, which also appear in Rules 32.1(a) through (g). Rule 32.1(h) is not one of the statutory grounds—it was added by the Arizona Supreme Court in 2000 after a committee examined and proposed changes to Rule 32. *Miles*, 243 Ariz. 517, ¶ 27 (Pelander, V.C.J., concurring). And the portion of the Rule relating to the death penalty was not contained in the committee’s rule-change petition, but was instead “added by [the Arizona Supreme] Court without circulation for comment and without explanation of its meaning or practical application.” *Id.* As a whole, Rule 32.1(h) “has no constitutional or statutory counterpart.” *Id.*

The fact that Rule 32.1(h) is a court-created ground for relief raises separation-of-powers concerns. A.R.S. § 13–4231 arguably is a substantive statute, as it creates the right to obtain post-conviction relief under certain conditions instead of articulating a procedure for enforcing that right. *See Valerie M. v. Ariz. Dept. of Econ. Sec.*, 219 Ariz. 155, 162, ¶ 22 (App. 2008) (“[I]t is generally agreed that a substantive law creates, defines and regulates rights while a procedural one prescribes the method of enforcing such rights or obtaining redress.”) (quoting *Allen v. Fisher*, 118 Ariz. 95, 96 (App. 1977)). “A change in the substantive law can *only* be given or denied by [the] constitution or the legislature of [this] state.” *State v. Fletcher*, 139 Ariz. 187, 191–92 (1986) (quotations omitted); *see also Siebel v. Seisinger*, 220 Ariz. 85, 92, ¶ 26 (2009) (when substantive statute conflicts with procedural rule, statute must prevail); *State v. Fowler*, 156 Ariz. 408, 413 (App. 1987) (if post-conviction statutes create substantive rights, those rights are found in A.R.S. § 13–4231).

It was proposed in our workgroup that the guilt-phase portion of the Rule could survive a separation-of-powers challenge because it provides a remedy, which is not available in federal court, for a potential constitutional violation. *See House v. Bell*, 547 U.S. 518, 554 (2006) (assuming without deciding that “in a capital case, a truly persuasive demonstration of “actual innocence” made after

trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim”) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)). This in fact appears to be one of the reasons Rule 32.1(h) was added. See Ariz. R. Crim. P. 32.1(h), 2000 cmt. It was also argued in our workgroup that affording an avenue for relief where a defendant can show he is ineligible for the death penalty may be constitutionally justified. See *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992) (noting that the actual-innocence concept has been interpreted to mean innocence of the death penalty and rejecting proposed definition that addressed only elements of crime) (citing *Smith v. Murray*, 477 U.S. 527, 537–39 (1986)).

However, Rule 32.1(h)’s current, broad language has been construed by at least one superior court to potentially permit relief in a situation not contemplated by either the constitution or § 13–4231: when a defendant produces additional mitigation evidence after trial and argues that, had the sentencer heard that evidence, it would not have imposed the death penalty. See *Miles*, 243 Ariz. at 513–14, ¶¶ 8–10 (declining to construe Rule 32.1(h)’s innocence-of-the-death-penalty clause after affirming trial court’s decision on other ground). The clarifying language in the instant proposal would thus shore up the Rule against a separation-of-powers challenge by cabining Rule 32.1(h) claims to those that arguably have a constitutional underpinning.

B. The proposal would rectify problems with the Rule’s practical application by limiting relief to factual innocence.

By its plain language, Rule 32.1(h) contemplates a fact-based inquiry. See Ariz. R. Crim. P. 32.1(h) (referring to “the facts underlying the claim”). And courts applying the Rule have repeatedly recognized that “actual innocence means factual innocence.” *State v. Pineda-Navarro*, 2017 WL 4927692, at *2, ¶ 5 (Ariz. Ct. App. Oct. 31, 2017) (quotations omitted); accord *State v. Espino-Torres*, 2017 WL 2871509, *2, ¶ 6 (Ariz. Ct. App. July 6, 2017). While the existence of a death-qualifying aggravating factor is a factual question, the determination whether a defendant’s mitigation is sufficient to warrant a life sentence is not—that process is instead “‘inherently subjective’ and not the equivalent of a ‘mathematical formula.’” *State v. Glassel*, 211 Ariz. 33, 46, ¶ 40 (2005) (quoting *State v. Hoskins*, 199 Ariz. 127, 154, ¶ 123 (2000)); see *State ex rel. Thomas v. Granville*

(*Baldwin*), 211 Ariz. 468, 473, ¶ 21 (2005) (“[T]he determination whether mitigation is sufficiently substantial to warrant leniency is not a fact question to be decided based on the weight of the evidence, but rather is a sentencing decision to be made by each juror based upon the juror’s assessment of the quality and significance of the mitigating evidence.”).

This subjectivity is the reason the Court in *Sawyer* defined “innocence of the death penalty,” for purposes of excusing a successive, abusive, or defaulted federal-habeas claim, as *ineligibility* for the death penalty. *See Sawyer*, 505 U.S. at 342–43 (“once eligibility for the death penalty has been established to the satisfaction of the jury, its deliberations assume a different tenor” and, rather than focus on concrete, objectively-defined aggravators, the jury makes a highly-subjective, discretionary, individualized determination whether death is appropriate). Since the standard is inherently subjective, it is nearly impossible to assess at all—let alone prove by clear-and-convincing evidence—how a sentencer “would have reacted to additional showings of mitigating factors, particularly considering the breadth of those factors that a jury ... must be allowed to consider.” *Id.* at 346.

Other jurisdictions have followed *Sawyer*’s lead and required defendants attempting to avail themselves of preclusion-exempt innocence-of-the-death-penalty claims to show their ineligibility for the death penalty. *See Lisle v. State*, 351 P.3d 725, 730–34 (Nev. 2015); *Ex Parte Blue*, 230 S.W.3d 151, 160–62 (Tex. Ct. Crim. App. 2007); *Knight v. State*, 923 So. 2d 387, 411–23 (Fla. 2005); *Bowling v. Com*, 163 S.W.3d 361, 372–73 (Ky. 2005); *Clay v. Dormire*, 37 S.W.3d 214, 218 & n.1 (Mo. 2000). And many jurisdictions have defined innocence of the death penalty through statute to require a showing of death-ineligibility. *See* Cal. Penal Code § 1509(d); N.C. Gen. Stat. Ann. § 15A-1415(c); Ohio Rev Code Ann. § 2953.21(A)(1)(a)(b).

Thus, because the sentencing decision is not a “factual” one, a defendant cannot show by clear-and-convincing evidence that “the facts” underlying a mitigation-based challenge to his death sentence warrant relief. *See* Ariz. R. Crim. P. 32.1(h). A defendant, however, can show that “the facts” underlying his actual-innocence claim undermine the objective and concrete aggravator(s) that made him

eligible for the death penalty. The proposed language recognizes this reality and thus enhances the Rule's reliability and practical functioning.

C. The proposal would promote finality and reduce the risk of Rule 32.1(h) being used to circumvent Rule 32.1(e).

In his concurring opinion in *Miles*, Justice Pelander expressed concern about the overlap between Rule 32.1(e)'s newly-discovered-evidence provision and Rule 32.1(h), and cautioned that "using Rule 32.1(h) as an end-run around Rule 32.1(e)'s due-diligence requirement when, as here, relief is sought decades later based solely on newly discovered mental-health evidence and expert opinions, seems at odds with interests of finality and victim rights." *Miles*, 243 Ariz. at 519, ¶ 35 (Pelander, V.C.J., concurring) (citing Ariz. Const. art. 2, § 2.1(A)(10) & A.R.S. § 13-4401(19)). This is a compelling worry, because Rule 32.1(h) is immune from preclusion and timeliness rules and thus must be narrowly-tailored and sparingly-applied to prevent it from swallowing those rules. *See Lisle*, 351 P.2d at 731, 734 (if innocence-of-the-death-penalty were expanded to include new mitigation, "the [actual-innocence] exception would swallow the procedural defaults adopted by the Legislature").

This concern is amplified where inexact mental-health evidence (which often forms the basis of a defendant's mitigation case) is concerned, as a death-sentenced defendant could file a Rule 32.1(h) claim at any time based on nothing more than a newly-generated expert opinion. *Cf. State v. Pandeli*, 242 Ariz. 175, 192, ¶ 74 (2017) ("We note that opinion testimony often includes subjective components, and good faith disagreements among credible experts are not unusual ..."). The Arizona Supreme Court recently limited a defendant's ability to use advances in mental-health evidence to prove Rule 32.1(e)'s elements. *See State v. Amaral*, 239 Ariz. 217, 221–22, ¶¶ 17–18 (2016). But Rule 32.1(h), as currently phrased, contains no such limits and thus permits a defendant to sidestep Rule 32.1(e), *Amaral*, and finality interests by characterizing his claim as one of actual innocence.

While the proposal may not eliminate the overlap between Rules 32.1(e) and (h), it reduces that overlap by confining Rule 32.1(h) to concrete factual issues on which mental-health evidence is generally inadmissible. By so doing, the proposal not only facilitates crime victims' rights to a prompt and final resolution of a

criminal case, *see* Ariz. Const. art. 2, § 2.1(A)(10), but it also advances the twin goals of Rule 32 itself: to safeguard finality and to accommodate “the unusual situation where justice ran its course and yet went awry.” *State v. Carriger*, 143 Ariz. 142, 146 (1984) (quoting *State v. McFord*, 132 Ariz. 132, 133 (App. 1982)) (emphasis added); *see State v. Shrum*, 220 Ariz. 115, 118, ¶ 12 (2001) (preclusion rules “prevent endless or nearly endless reviews of the same case in the same trial court”) (quoting *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 11 (2002)).

II. The Rule should expressly direct a court to review an innocence-of-the-death-penalty claim from the perspective of a reasonable sentencer.

The current Rule permits relief when a defendant shows that the death penalty “would not have been imposed.” Ariz. R. Crim. P. 32.1(h). Prior to restyling, the Rule provided for relief if a defendant showed that the sentencer “would not have imposed the death penalty.” *See* Ariz. R. Crim. P. 32.1(h) (2017).

In *Miles*, five members of the Arizona Supreme Court and a court of appeals judge sitting by designation appeared to agree that the Rule should encompass an objective standard. *Miles*, 243 Ariz. at 514, ¶ 11 (Timmer, J., joined by Bales, C.J., and Brutinel, J.) (construing the “would not have imposed the death penalty” language to require examination from a reasonable-factfinder perspective because a subjective standard would make the Rule unworkable); *id.* at 518, ¶¶ 29–32 (Pelander, V.C.J., joined by Gould, J., and Court of Appeals Judge Swann) (expressing concern that pre-restyling Rule lent itself to conjectural analysis, but opining that restyled Rule implicitly recognized an objective standard).

The proposed addition of the “no reasonable fact-finder” language to the Rule’s second clause, and the deletion of the language “the death penalty would not have been imposed,” clarifies that a reviewing court must evaluate the question whether an eligibility factor exists from a reasonable-sentencer perspective. This eliminates any possibility that the Rule could be construed to require a showing that the original sentencer subjectively would not have imposed the death penalty—a nearly impossible standard to meet. *See Miles*, 243 Ariz. at 514, ¶ 11. The change also harmonizes the Rule’s death-penalty clause with its conviction-related clause. *See* Ariz. R. Crim. P. 32.1(h).

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 an ~~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 subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) the sentence imposed is 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 a notice of appeal was not the defendant's fault;
 - (g) there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's 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 32.1(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 32.1(b). This provision retains the basic attack on jurisdiction universally recognized as a ground for collateral attack.

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

Rule 32.1(d). This 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, 26.16(a), and 31.2.

Rule 32.1(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 32.1(b) through (h). A claim under Rule 32.1(b) through (h) that defendant raises in a successive or untimely post-conviction notice must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why defendant did not raise the claim in a previous petition or in a timely manner, the court may summarily dismiss the notice. 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 32.1(d) through (h).

(B) ***Time for Filing a Notice in a Capital Case.*** In a capital case, the Supreme Court clerk must expeditiously file a notice of post-conviction relief with the trial court upon the issuance of the mandate affirming the defendant's conviction and sentence on direct appeal.

(C) ***Time for Filing a Notice in an Of-Right Proceeding.*** In a Rule 32 of-right proceeding, a defendant must file the notice no later than 90 days after the 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.]

(E) *Excusing an Untimely Notice.* The court may excuse an untimely notice of post-conviction relief if the failure to timely file a notice was not the defendant's fault.

(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 within 5 days of its filing and must note in the record the date and manner of sending the copy. The clerk also must send a copy of any final ruling in the post-conviction proceeding to the appropriate appellate court, as provided in Rule 32.9(c).

(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 must appoint co-counsel.

(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.

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

(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; Waiver of Attorney-Client Privilege; Defendant's Pro Se Petition. In a Rule 32 proceeding, counsel must investigate the defendant's case for any and all colorable claims. By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

(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.

(e)-(g) [No change]

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

(g) **Assignment of a Judge.** The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge
Notwithstanding Rule 10.2(a)(4), a party who has not previously exercised a change of judge as a matter of right, is entitled to a change of judge if the sentencing judge is unavailable, or if the sentencing judge is expected to be a witness. ..

(h) **Discovery.** After the filing of a notice, the Court, upon good cause shown, may enter an order allowing discovery. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim.

(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 31.4(b) (requiring consolidation unless good cause exists not to do so).

Proposed comment to Rule 32.4(d)(2)

Rules 32.4(d)(2) and (3) are intended to assist counsel in reviewing the record to ensure that substantial justice is done. Failure to complete Form , or identify any issues listed in Rules 32.4(d)(2) and (3), does not constitute a *per se* deviation from prevailing professional norms to the extent a pleading defendant possesses a right to effective post-conviction counsel under Arizona law. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Rule 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.

(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. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

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

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

(ii) If the time for filing the petition or cross-petition for review has expired,

the party may seek leave by the trial court to file a delayed petition or cross-petition for review. If the trial court grants the party leave to file a delayed petition or cross-petition for review, the trial court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

(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 trial court a “notice of filing.” The notice of filing may designate additional items for the record described in (h). 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) *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 for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

(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.

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

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

(6) *Response to Petition or Cross-Petition for Review; Reply*

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

(i) *Time and Place for Filing.* No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate court.

(ii) *Extensions of Time.* Rule 31.3(d) governs the computation of the deadline for filing the response. A party may file a motion with the appellate court for an extension of the time in accordance with Rule 31.3(e).

(B) *Service of Response to Petition or Cross-Petition for Review.* A party filing a response to a petition or cross-petition for review, appendix, or a related filing must serve a copy of the filing on all other parties. The serving party must file a certificate of service complying with [Rule 1.7\(c\)\(3\)](#), identifying who was served and the date and manner of service.

(C) *Form and Length.* (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 (d)(3)(A). An appendix to a response must comply with the form and substantive requirements in (d)(3)(B).

(D) 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 (d)(3)(A) and may not include an appendix. Service of the reply shall be in accordance with (d)(5) and any extensions of the time for filing the reply may be requested in the appellate court pursuant to (d)(6)(A).

(7) Modifying Deadlines. Except as otherwise provided herein, [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\(e\)](#).

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

(f) 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.

(g) 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.

(h) [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.

(i) 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).

(j) 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.

(k) 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)(1)(B) and (C) apply, and that a reasonable probability exists that either:

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

- (3) **Laboratory; Costs.** If the court orders testing under (d)(1) 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 an ~~of-right~~ notice challenging the effectiveness of Rule 32 counsel in the ~~first~~ of-right proceeding.

Grounds for Relief. Grounds for relief are:

- (a) the defendant's conviction was obtained or the sentence was imposed in violation of the United States or Arizona constitutions;
- (b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) the sentence 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 a ~~notice of post-conviction relief of right or a~~ notice of appeal ~~within the required time~~ was not the defendant's fault;
 - (g) there has been a significant change in the law that, if ~~applied~~ applicable 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 32.1(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 32.1(b). This provision retains the basic attack on jurisdiction universally recognized as a ground for collateral attack.

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

Rule 32.1(d). This 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, 26.16(a), and 31.2.

~~**Rule 32.1(f).** This provision includes the situation in which the defendant fails to appeal because the trial court, despite the requirements of Rule 26.14(a)(1), did not advise him of his appeal rights, and the situation in which the defendant intended to appeal and thought timely appeal had been filed by his attorney when in reality it had not.~~

Rule 32.1(h). This claim is independent of a claim under 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 32.1 ~~L(eb)(d)~~ through (h). A claim under Rule 32.1 ~~(db)~~ 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. A court may determine that an issue is precluded even if the State does not raise preclusion.

~~(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.]

(E) *Excusing an Untimely Notice.* The court may excuse an untimely notice of post-conviction relief if the failure to timely file a notice was not the defendant's fault.

(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 ~~court no later than~~ within 5 days of its ~~filing and~~ filing and must note in the record the date and manner of sending the copy. The clerk also must send a copy of any final ruling in the post-conviction proceeding to the appropriate appellate court, as provided in Rule 32.9(c).

(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 must appoint co-counsel.

(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.

(2)(3) Investigators, Expert Witnesses, and Mitigation Specialists. On application and if the trial court finds that such assistance is reasonably

necessary, it may appoint an investigator, expert witnesses, and a mitigation specialist, or any combination of them, under Rule 6.7 at county expense.

(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; Waiver of Attorney-Client Privilege; Defendant's Pro Se Petition. In a Rule 32 proceeding, counsel must investigate the defendant's case for any and all colorable claims. By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

(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.

(e)-(g) [No change]

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

(g) Assignment of a Judge. The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. Notwithstanding Rule 10.2(a)(4), a party who has not previously exercised a change of judge as a matter of right, is entitled to a change of judge if the sentencing judge is unavailable, or if the sentencing judge is expected to be a witness. If the sentencing judge's testimony will be relevant, the case must be reassigned to another judge.

(h) Discovery. At any time after the filing of a notice, the Court, for upon good cause shown, may enter an order allowing discovery upon a showing of good cause. To establish show good cause, the moving party must identify the potential colorable claim to which the discovery relates and must show that there are reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim.

(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 31.4(b) (requiring consolidation unless good cause exists not to do so).

Proposed comment to Rule 32.4(d)(2)

Rules 32.4(d)(2) and (3) are intended to assist counsel in reviewing the record to ensure that substantial justice is done. Failure to complete Form , or identify any issues listed in Rules 32.4(d)(2) and (3), does not constitute a *per se* deviation from prevailing professional norms to the extent a pleading defendant possesses a right to effective post-conviction counsel under Arizona law. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Rule 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.

~~(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. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

~~(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.~~

~~(a) —~~

(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 of 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).~~

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

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

(ii) If the time for filing the petition or cross-petition for review has expired, the party may seek leave by the trial court to file a delayed petition or cross-petition for review. If the trial court grants the party leave to file a delayed petition or cross-petition for review, the trial court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

~~(2)~~ **(2) Notice of ~~filing~~-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 trial court a “notice of filing.” The notice of filing may designate additional items for the record described in ~~(eh)~~. 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)~~ **(3) 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 for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

(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)~~(4) *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. [Lacey's suggested edits.]

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

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

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

~~(6) *Service; Response; Reply.*~~

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

~~(B) *Response.* 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.~~

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

(6) *Response to Petition or Cross-Petition for Review; Reply*

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

(i) *Time and Place for Filing.* No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate court.

(ii) *Extensions of Time.* Rule 31.3(d) governs the computation of the deadline for filing the response. A party may file a motion with the appellate court for an extension of the time in accordance with Rule 31.3(e).

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

(C) Form and Length. (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 (d)(3)(A). An appendix to a response must comply with the form and substantive requirements in (d)(3)(B).

(D) 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 (d)(3)(A) and may not include an appendix. Service of the reply shall be in accordance with (d)(5) and any extensions of the time for filing the reply may be requested in the appellate court pursuant to (d)(6)(A).

(7) Modifying Deadlines. Except as otherwise provided herein, 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).

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

~~(d)(f)~~ **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)(g)~~ **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)~~**(h)** **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)~~**(i)** **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)~~**(j)** **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)~~**(k)** **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)(1)(B) and (C) apply, and that a reasonable probability exists that either:

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

(3) **Laboratory; Costs.** If the court orders testing under (d)(1) 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.