

Rule 32 Task Force

Meeting Agenda

Tuesday, December 4, 2018

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

State Courts Building * 1501 West Washington * Conference Room 230 * Phoenix, AZ

Item no. 1	Call to Order Introductory remarks	<i>Hon. Joseph Welty, Chair</i>
Item no. 2	Approval of the November 9, 2018 meeting minutes	<i>Judge Welty</i>
Item no. 3	Discussion of Rule 32/33, including recent revisions	<i>Judge Cattani All</i>
Item no. 4	Discussion of a draft rule petition	<i>Judge Welty All</i>
Item no. 5	Approval of the Task Force work product	<i>Judge Welty</i>
Item no. 6	Roadmap	<i>Judge Welty</i>
Item no. 7	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: November 9, 2018**

Members attending: Hon. Joseph Welty (Chair), Timothy Agan, Hon. James Beene, Hon. Cathleen Brown Nichols (by telephone), Hon. Kent Cattani (by telephone), Hon. Peter Eckerstrom, David Euchner, Hon. Kellie Johnson, Jason Kreag, Michael Mitchell, Hon. Samuel Myers, David Rodriquez, Hon. James Sampanes, Mikel Steinfeld, Lacey Stover Gard

Absent: Jennifer Garcia, Dan Levey, Hon. Danielle Viola, Hon. Rick Williams

Guests: Tim Geiger, Kathryn Andrews

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

1. **Call to order; introductory remarks; approval of meeting minutes.** The Chair called the fourth Task Force meeting to order at 11:52 a.m. He thanked the members for their flexibility regarding the starting time of today's meeting. He then asked members to review the August 31 draft meeting minutes. There were no corrections and a member made the following motion:

Motion: To approve the August 31, 2018 minutes. The motion received a second and it passed unanimously. **R32TF: 003**

The Chair then requested a report from Workgroup 1, which met on September 25, a few weeks after the previous Task Force meeting.

2. **Workgroup 1.** Mr. Euchner began his presentation with a general observation that the "split" version of Rule 32 – i.e., separating the rules for post-conviction proceedings into a Rule 32 for proceedings after a trial, and a new Rule 33 for proceedings after a guilty plea – was "going down the wrong path." To discuss the workgroup's changes, Mr. Euchner preferred using the August 31 version of Rule 32, which was in the meeting materials, rather than the November 9 versions of Rules 32 and 33, which also were in the materials. Because some of the most recent revisions had been restyled and reorganized in the November 9 version, the Chair requested that Judge Cattani, the architect of the split version, explain what had changed.

3. **Introduction to the split version.** Judge Cattani said the objective of the split version was to direct defendants who had pled guilty to a self-contained rule they could more easily follow. He accomplished this by relocating from Rule 32 into a new Rule 33 the essential provisions concerning "of right" petitions. His primary intent was to avoid confusion between pleading and non-pleading defendants. By doing so, "of-right" terminology was eliminated from the rules on post-conviction proceedings. Defendants sentenced after a trial would continue to utilize Rule 32, but the revised Rule 32 would be free of what members previously acknowledged was the confusing of right terminology that's contained in current Rule 32. Put simply, Rule 32 and Rule 33 would provide the complete procedural tracks and

*Rule 32 Task Force
Draft Minutes: 11.09.2018*

requirements, respectively, for defendants who are found guilty at trial and for defendants who enter a guilty or no contest plea.

The Chair noted that redundancy in these two rules was not ideal, but also thought the rules provided the benefit of clarity for judges as well as self-represented litigants. A prosecutor member had discussed the concept with colleagues, who agreed that because most defendants enter guilty pleas, the new Rule 33 makes good sense. Another prosecutor concurred. But Mr. Euchner explained the basis of his opposition. He thought the two new rules were too complex because they contained 38 parts, compared to 12 parts in current Rule 32. He envisioned difficulty doing legal research because case law would no longer align with referenced subparts. And he believed that inmates, who often lack access to up-to-date rule books, would be disadvantaged using the old books. He acknowledged that the recent Criminal Rules restyling resulted in a reorganized Rule 31 (“appeals”) that includes 24 subparts but added that even those changes required relearning cross-references in the old version. He thought the increased number of subparts in Rules 32 and 33 would create immeasurable confusion, and that it would be harder to locate new provisions. He proposed an alternative in which Rules 31 and 32 would be in a new standalone set of post-judgment rules, much like the ARCAP for civil appeals.

Judge Cattani said that current Rule 32 almost immediately confounds pleading and non-pleading defendants. Rule 32.2 on preclusion refers to issues raiseable on direct appeal or adjudicated on the merits on an appeal, neither of which has application to pleading defendants because they have no right to appeal. Preclusion is a critical concept in post-conviction proceedings, and its applicability is not clear under the current rule. Another judge member thought the split rules were consistent with the directions of Administrative Order No, 2018-07, which established the Task Force. Although a defense attorney member found Mr. Euchner’s alternative proposal meritorious, a defense attorney member also voiced support for Judge Cattani’s split version because self-represented defendants would benefit from its increased clarity. However, this member noted that duplication in Rules 32 and 33 would require heightened diligence in proposing parallel rule amendments in the future. Another member asked what would happen when an appellate court interpreted a provision in one of the split rules without considering the parallel provision. Members thought counsel could rationally argue that the decision would apply to both, unless a provision was unique to pleading or non-pleading defendants, a circumstance that arises under current Rule 32. Members considered a proposal for two shorter rules that distinguished procedures for pleading and non-pleading defendants, and a third rule the included procedures common to both. This would reduce redundancy, but members did not support the proposal.

The Chair observed that the Task Force now had an opportunity to take bold action to fix and clarify a broken and confusing rule. He recognized that the split rules might create short-term challenges, but they would offer a better, clearer set of rules and a more efficient process in the long-term. He thought the Supreme Court would thoughtfully consider the split rules proposal. At this point, members voted on whether to proceed with the split set of rules.

Motion: To proceed with further drafting based on the Rule 32/Rule 33 concept. The motion received a second and passed with one member opposed. **R32TF: 004**

For future discussions, members requested a redline, compare, or side-by-side version that would show detailed changes the November 9 version made to the August 31 version. Staff noted that a 5-page document in the supplemental meeting packet titled “notes of significant changes” that highlighted these changes.

In response to follow-up questions, Judge Cattani noted two specific changes. First, in Rule 32.4 of the former version, Mr. Steinfeld’s revisions required that a notice of no colorable claim identify a list of items (9 items in a petition from a change of plea, and 14 items in a petition from a trial.) The revised version required the notice to identify only the first 5 items, and to include an avowal that counsel had reviewed or considered the remaining items in the list. Mr. Steinfeld maintained that an avowal was insufficient to verify that counsel diligently performed a full review. Judge Cattani responded that if the notice becomes too complex, counsel will raise a single issue to avoid identifying the long list of items. Members concurred with a compromise that counsel “should identify” the items.

Judge Cattani also noted that revised Rule 32.15 and Rule 33.15 would require notification to the appellate court only if the trial court grants relief; unlike the prior version, notice would not be required when the trial court denies relief. Moreover, the burden of providing the notice under these revised rules shifts from the clerk to defense counsel. This shift relieves the clerk of a duty to review the trial court’s ruling and attempting to determine if the trial court granted relief in a manner that would impact the pending appeal.

Judge Cattani was asked whether a capital defendant who pled guilty to first-degree murder before the start of trial, but who was subsequently sentenced to death by a jury in the penalty phase of trial, would proceed under Rule 32 or Rule 33. Judge Cattani noted that proposed Rule 32.3(c) would explicitly require that defendant to proceed under Rule 32 for all post-conviction relief. See further *State v Ovante*, 231 Ariz. 180 (2013). He added that this principle should be embedded in the next draft of this rule by making it applicable to non-capital cases. Judge Myers observed that Criminal Rule 17.7, which was a new rule that resulted from the restyling project, concerns “submitting a case on the record.” He asked that this Task Force clarify in its draft whether a conviction under Rule 17.7 would be reviewable under Rule 32 or Rule 33.

Finally, members discussed an issue under Rule 33.1(e). The draft provides for newly discovered evidence that “probably would have changed the sentence.” Could newly discovered evidence under this rule concern the validity of the plea? Members agreed that it might, and the rule should not be limited to new evidence regarding the sentence. Judge Cattani initially thought that Rule 33.1(h) would cover newly discovered evidence that might have affected the plea, but then agreed that the draft Rule 33.1(e) also should encompass that circumstance.

4. **Rule 32.1(h).** Members proceeded to revisit issues arising in capital cases under Rule 32.1(h) and articulated in [State v. Miles](#). Members had previously considered separate memos prepared by Ms. Gard on behalf of the Attorney General and by the Federal Public Defender on behalf of the defense community. Today’s meeting materials included two

*Rule 32 Task Force
Draft Minutes: 11.09.2018*

additional memos, one prepared by Mr. Steinfeld and the other by Ms. Gard, each of which contained newly proposed language for Rule 32.1.

Mr. Steinfeld proposed the following modification to Rule 32.1(h):

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

Mr. Steinfeld noted that his proposal squarely addresses the Supreme Court's interest in an objective standard for this provision, as expressed in the *Miles* opinion.

Ms. Gard's proposed modifications would revise Rule 32.1(c) and (h) as follows:

(c) a non-capital ~~the sentence imposed~~ exceeds the maximum authorized by law, ~~or is otherwise not in accordance with the sentence authorized by law~~ or, in a capital case, the defendant presents clear and convincing evidence that no reasonable fact-finder would have found the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752;

....

(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~~.

Ms. Gard reiterated that it is unreasonable to use an objective standard for reviewing a mitigation decision in a death penalty case because mitigation is expressly subjective. Accordingly, her modifications would address eligibility for the death penalty, i.e., the aggravation phase, but would remove penalty phase decisions, which weight aggravating and mitigating factors, from the scope of Rule 32.1.

The Chair opened both proposals for member comments. One member said that Ms. Gard's proposal deviated from the Court's request in *Miles* for the Task Force to address the standard because her proposal instead dealt with eligibility. A judge member noted that many federal court remands of Arizona capital cases involved reconsideration of mitigation and thought that Mr. Steinfeld's proposal was a better way for Arizona courts to review those claims. Members generally agreed that neither proposal would further finality because there will undoubtedly be further federal court review of mitigation issues. For that reason, one member favored Ms. Gard's proposal because federal courts will apply their own mitigation jurisprudence regardless. Members also discussed whether modifying Rule 32.1(h) would be a substantive change in derogation of A.R.S. § 13-4231 and separation of powers principles. Citing *Seisinger v Siebel* (Ariz. 2009), a judge member noted that the Arizona Supreme Court adopted Rule 32.1(h) almost two decades ago, yet the Legislature took no action in response during that interval, thereby allowing the judiciary to occupy that space. Another judge member believes Rule 32.1(h)

*Rule 32 Task Force
Draft Minutes: 11.09.2018*

is entirely substantive because it provides a right not found in statute. One member noted that a Rule 32.1(h) issue is rarely raised in a capital case, yet it is a matter of special concern to the Attorney General. Rather than having the Task Force resolve this issue, the member proposed that the Attorney General should independently file a rule petition.

At that point, the Chair presented three matters to the members, with the third matter being dispositive:

- (1) Should the Task Force advance Mr. Steinfeld's proposed modification? 9 members favored doing so, 5 did not.
- (2) Should the Task Force advance Ms. Gard's recently proposed modifications? 7 members favored doing so, 7 did not. The Chair favored doing so and therefore broke the tie.
- (3) Which modifications, Mr. Steinfeld's or Ms. Gard's, should the Task Force recommend in its rule petition?

Vote on the third matter: 7 members favored Mr. Steinfeld's proposed modification, 6 favored Ms. Gard's, and there was one abstention (Judge Sampanes).

The Task Force accordingly will recommend modifying Rule 32.1(h) in the manner proposed by Mr. Steinfeld.

5. Illegal sentences. Judge Eckerstrom and Ms. Beckmann prepared a memo for the members' consideration titled, "Identifying Parameters of Illegal Sentence Under Rule 32.1(c) in Evaluating Whether to Except Such Claims [Under] Rule 32.2 and Time Limits of Rule 32.4." They concluded that if an inmate is confined on an unlawful sentence, there is no societal interest in continuing to hold that inmate and the inmate's claim for relief under Rule 32.1(c) should not be precluded. These claims are often untimely – and subject to automatic preclusion under current Rule 32.2 – because the inmate might not check a release computation until the release date nears and might not realize until then that his or her confinement might exceed what the law allows. Judge Eckerstrom prefers that these claims not be precluded if the inmate has a legitimate reason for not raising it previously. He believes the language in the current draft of Rule 32.1(c) ("the sentence imposed exceeds the maximum authorized by law") is appropriate, but he is concerned that this might open the door for other claims – for example, the judge did not give the sentence the inmate wanted, or thought was deserved – that should rightly be precluded. The drafting challenge is distinguishing claims under Rule 32.1(c) that should be heard on the merits without an awkward end-run around preclusion, from many claims that are truly frivolous and should be precluded under Rule 32.2. Judge Eckerstrom proposed a comment to clarify the intent of Rule 32.1(c), which is to provide a remedy for sentences that are unlawful as a matter of law. One member noted that inmates will file claims even when they are precluded, but if certain categories of claims (Rule 32.1(b), (c), and (d)) are no longer subject to preclusion, inmates might attempt to fashion a precludable section (a) claim into a non-precludable claim under one of the other sections.

Rule 32 Task Force
Draft Minutes: 11.09.2018

Staff noted that the Rule 32.1(c) language of the split version (“the sentence imposed exceeds the maximum authorized by law”) differs from the language in the prior version (“the sentence imposed is not in accordance with the sentence authorized by law.”) Staff referred to the fourth page of the August 31 meeting minutes where members discussed this rule, and their concern at that time that previously stricken language (“exceeds the maximum authorized by law”) should have been retained, and the retained language (“not in accord with the sentence authorized by law”) should have been deleted. At its subsequent September meeting, Workgroup 1 agreed with the concern, and reversed what was stricken and what was retained. The phrase “exceeds the maximum authorized by law” was therefore included in the subsequent split draft.

Members continued to discuss the drafting issues and used as an example a plea agreement and sentence that required a defendant to serve 85% of the specified sentence, which was thereafter recomputed by the Department of Corrections to require service of 100% of the sentence. Would either phrase in Rule 32.1(c) apply to this circumstance? Members also discussed whether “probation,” including a probation tail after a period of incarceration, would constitute a sentence under section (c), or whether courts would consider probation a suspension of the imposition of a sentence. To address these and related issues, members considered adding a comment to Rule 32.1, revising the preclusion language of Rule 32.2, or adding a comment to Rule 32.2. A judge member proposed a remedy under Rule 32.1(c) for a defendant whose sentence exceeded the maximum allowed by law, or whose sentence exceeded what was announced or imposed by the sentencing court. Members did not reach consensus on any of these proposed solutions, but they agreed that sentencing errors should not be subject to preclusion and to work on correct phrasing that incorporates this principle.

6. **Roadmap.** The Chair noted the need for another Task Force meeting and proposed a date of Tuesday, December 4, 2018. It appeared that a quorum would be available on that date and staff will notice the meeting. The meeting will begin at 10:00 a.m. The following are among the areas that members will need to address at the next meeting:

- Further refinements to Judge Cattani’s split draft of Rules 32 and 33;
- Resolution of the language for illegal sentences, as noted in section (5) of these minutes;
- Issues concerning the timeliness of a post-conviction notice;
- A proposal by John Miles concerning page limits.

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

8. **Adjourn.** The meeting adjourned at 4:03 p.m.

Rule 32. Post-Conviction Relief for Defendants SENTENCED FOLLOWING A Trial

Rule 32.1. Scope of Remedy

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

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

Grounds for Relief. Grounds for relief are:

- (a) the defendant's conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions;
- (b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) ~~the sentence 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 or will continue to be in custody after his or her sentence expired;
- (e) the existence of newly discovered material facts that 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 such critical significance that the impeachment 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 presents clear and convincing evidence 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), and still open for discussion.]

COMMENT

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

Rule 32. I(b). This provision provides a basis to challenge the court’s subject matter jurisdiction, which is universally recognized as a ground for post-conviction relief.

~~**Rule 32.1(c).** This provision provides a basis to challenge a sentence even though the petitioner does not contest the validity of the underlying conviction.~~

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

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

Rule 32.2. Preclusion of Remedy

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

- (1) still raiseable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;
- (2) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding; or
- (3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Exceptions. Claims for relief based on Rule 32.1(b) ~~and (d)~~ through (h) are not subject to preclusion under Rule 32.2(a). ~~Claims for relief pursuant to 32.1(e) based on a sentence that exceeds the maximum authorized by law or a sentence imposed using an incorrect sentencing range are also not precluded under Rule 32.2(a).~~ However, a claim that falls under one of these exceptions under Rule

32.1(b) through (h) and that a 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 notice or petition ~~or in a timely manner~~, the court may summarily dismiss the notice. A court at any time may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

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

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

COMMENT

This rule provides that all Rule 32 proceedings are to be treated as criminal

actions. The characterization of the proceeding as criminal assures compensation for appointed counsel, and the applicability of criminal standards for admissibility of evidence at an evidentiary hearing, except as otherwise provided.

Rule 32 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq., which provides a remedy for individuals who are unlawfully committed, detained, confined, or restrained. BUT IF A CONVICTED DEFENDANT FILES A PETITION FOR A WRIT OF HABEAS CORPUS (OR AN APPLICATION WITH A DIFFERENT TITLE) THAT ~~petition~~ ~~or application that has another title, such as petition for a writ of habeas corpus, but~~ ~~which~~ seeks relief that is available under Rule 32, THE PETITION OR APPLICATION will be treated as a petition for post-conviction relief.

Rule 32.4. Filing a Notice Requesting Post-Conviction Relief

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

(b) Notice Requesting Post-Conviction Relief

- (1) *Where to File; Forms.*** A defendant must file a notice requesting post-conviction relief in the court where the defendant was convicted and sentenced. The court must make "notice" forms available for defendants' use.
- (2) *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).
- (3) *Time for Filing.***
 - (A) *Claims under Rule 32.1(a).*** A defendant must file the notice for a claim under Rule 32.1(a) within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the order and mandate in the direct appeal, whichever is later.
 - (B) *Claims under Rule 32.1(b) through (h).*** A defendant must file the notice for a claim under Rule 32.1(b) through (h) within a reasonable time after discovering the basis of the claim. [COMMENT FROM J. MCMURDIE: HOW ABOUT WITHIN 90 DAYS AFTER DISCOVERING THE BASIS OF THE CLAIM? REASONABLE

SEEMS TO BE TOO DISCRETIONARY.]

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

~~(D) *Excusing an Untimely Notice.* The court may excuse an untimely notice of post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a the notice was not the defendant's fault. [NEED TO DISCUSS THIS WITH THE TASK FORCE.]~~

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

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

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

(C) *Notice to an Appellate Court.* If an appeal of the defendant's conviction or sentence is pending, the clerk must send a copy of the notice of post-conviction relief to the appropriate appellate court within 5 days of its filing and must note in the record the date and manner of sending the copy. The clerk also must send a copy of any final ruling GRANTING RELIEF in the post-conviction proceeding to the appropriate appellate court, as provided in Rule 34.9.

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

of post-conviction proceedings.

PROPOSED COMMENT TO RULE 32.4(a):

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

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

If a petition is filed while an appeal is pending, the appellate court, under Rule 31.3(b), may suspend the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment or sentence. *See* Rule 31.4(b) (requiring consolidation unless good cause exists not to do so).

Rule 32.5. Appointment of Counsel.

(a) Noncapital Cases. No later than 15 days after the filing of a notice of a defendant's timely first Rule 32 proceeding, the presiding judge must appoint counsel for the defendant if:

- (1) the defendant requests it; and
- (2) there has been a previous determination that the defendant is indigent, or the defendant has completed an affidavit of indigency AND THE COURT FINDS THAT THE DEFENDANT IS INDIGENT.

Upon the filing of all other notices in a noncapital case, the presiding judge may appoint counsel for an indigent defendant if requested.

(b) Capital Cases. After the Supreme Court has affirmed aN INDIGENT capital defendant's conviction and sentence, the Supreme Court or its designee must appoint counsel who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. If the Supreme Court has authorized the presiding judge of the county where the case originated to appoint counsel, the presiding judge must file a copy of the appointment order with the Supreme Court. If a capital defendant files a successive notice, the presiding judge must appoint the defendant's previous post-conviction counsel, unless the defendant waives counsel or there is good cause to appoint another qualified attorney who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. On application and if the trial court finds that such assistance is reasonably necessary, it must appoint co-counsel.

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

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

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

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

(b) **Discovery.** After the filing of a notice, the court for good cause 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.

[NOTE: The Task Force should consider either revising this by raising the required showing for pre-petition discovery or relocating the provision so discovery is allowed only after filing a petition.]

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

- (1) a summary of the facts and procedural history of the case;
- (2) the specific materials that counsel reviewed;
- (3) the date counsel provided the record to the defendant, and the contents of that record;
- (4) the date(s) counsel discussed the case with the defendant;
- (5) the charges and allegations presented in the complaint, information, or

indictment.

In the notice, counsel should also identify the following:

- (6) any adverse pretrial rulings affecting the course of trial (e.g., motions to suppress, motions *in limine*, motions to quash, speedy trial motions);
 - (7) any adverse rulings during trial on objections or motions (e.g., objections regarding the admission or exclusion of evidence, objections premised on prosecutorial or judicial misconduct, mistrial motions, motions for directed verdict);
 - (8) any adverse rulings on post-trial motions (e.g., motion for a new trial, motion to vacate judgment);
 - (9) issues regarding jury selection, if the trial was to a jury;
 - (10) issues regarding jury instructions, if the trial was to a jury;
 - (11) any potential errors for which there were no objections, but which may rise to the level of fundamental error;
 - (12) any determination of the defendant's competency that was raised prior to sentencing;
 - (13) any objections raised at the time of sentencing;
 - (14) the court's determination of the classification and category of offenses for which the defendant was sentenced;
 - (15) the court's determination of pre-sentence incarceration credit;
 - (16) the sentence imposed by the court;
 - (17) issues raised by appellate counsel; and
 - (18) any potential claims of ineffective assistance of trial or appellate counsel.
- (d) **Defendant's *Pro Se* Petition.** Upon receipt of counsel's notice under section (c),

the defendant may file a petition on his or her own behalf, and the court may extend the time for the defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

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

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

PROPOSED COMMENT TO RULE 32.6(c)

Rule 32.6(c) is intended to assist counsel in reviewing the record to ensure that substantial justice is done. Failure to complete Form , or to identify any issues listed in Rules 32.6(c) does not constitute a *per se* deviation from prevailing professional norms ~~to the extent a pleading defendant possesses a right to effective post-conviction counsel under Arizona law.~~ See *Strickland v. Washington*, 466 U.S. 668 (1984).

Rule 32.7. Petition for Post-Conviction Relief

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

(1) Noncapital Cases.

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

- (i) Appointed counsel must file a petition no later than 60 days after the date of appointment.
- (ii) A self-represented defendant must file a petition no later than 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

(B) Time Extensions. For good cause and after considering the rights of the victim, the court may grant a defendant in a noncapital case a 30-day extension to file the petition. The court may grant additional

30-day extensions only on a showing of extraordinary circumstances.

(2) Capital Cases.

- (A) Generally.** In a capital case, the defendant must file a petition no later than 12 months after the first notice is filed.
- (B) Filing Deadline for Any Successive Petition.** On a successive notice in a capital case, the defendant must file the petition no later than 30 days after the notice is filed.
- (C) Time Extensions.** For good cause, the court may grant a capital defendant one 60-day extension in which to file a petition. For good cause and after considering the rights of the victim, the court may grant additional 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 thereafter until a petition is filed.

- (b) Form of Petition.** A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.
- (c) Length of Petition.**
 - (1) Non-Capital Cases.** In noncapital cases, the petition must not exceed 28 pages.
 - (2) Capital Cases.** In capital cases, the petition must not exceed 80 pages.
- (d) Declaration.** A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief. The

declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations.

- (e) **Attachments.** The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.
- (f) **Effect of Non-Compliance.** The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition, so it complies 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 32.8. Transcript Preparation.

- (a) **Request 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.
- (b) **Order Regarding Transcripts.** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant will raise in the petition.
- (c) **Deadlines.** The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no later than 60 days after the entry of an order granting the defendant's request for transcripts.
- (d) **Cost.** If the defendant is indigent, the transcripts must be prepared at county expense.
- (e) **Unavailability of Transcripts.** If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 32.9. Response and Reply; Amendments

(a) State's Response.

- (1) *Deadlines.* The State must file its response no later than 45 days after

the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.

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

(b) **Defendant's Reply.** The defendant may file a reply 15 days after a response is served. The court for good cause may grant an extension of time.

(c) **Length of Response and Reply.**

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

(4) *Capital Cases.* In capital cases, the State's response must not exceed 80 pages, and defendant's reply must not exceed 40 pages.

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

Rule 32.10. Assignment of a Judge.

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

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

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

(a) Summary Disposition. If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.

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

(c) Notice to Victim. If the court sets a hearing, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.

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

Rule 32.12. Informal Conference

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

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

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

Rule 32.13. Evidentiary Hearing

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

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

(c) Burden of Proof. The defendant has the burden of proving factual allegations by a preponderance of the evidence. If the defendant proves a

constitutional violation, the State has the burden of proving beyond a reasonable doubt that the violation was harmless.

(d) Decision.

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

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

(A) the conviction, sentence, or detention;

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

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

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

Rule 32.14. Motion for Rehearing.

(a) Timing and Content. No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

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

(c) Stay. The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court. [Cross-reference Rule 32.18(i).]

(d) Effect on Appellate Rights. Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 32.18.

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

Rule 32.15. Notification to the Appellate Court.

If an appeal of a defendant's conviction or sentence is pending, defendant's counsel, or if defendant is self-represented, the defendant, must file in the appellate court a notice of any relief granted by the trial court.

Rule 32.16. Petition and Cross-Petition for Review.

(a) Time and Place for Filing.

- (1) *Petition.*** No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (2) *Cross-Petition.*** The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.
- (3) *Place for Filing.*** The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.
- (4) *Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.***
 - (A)** A party may seek an extension of time for filing the petition or cross-petition for review by filing a motion with the trial court, which must decide the motion promptly.
 - (B)** If the time for filing the petition or cross-petition for review has expired, the party may request the trial court's permission to file a delayed petition or cross-petition for review. If the court grants the request to file a

delayed petition or cross-petition for review, the court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

(b) Notice of Filing and Additional Record Designation. No later than 3 days after a petition or cross-petition for review is filed, the petitioner or cross-petitioner must file with the trial court a “notice of filing.” The notice of filing may designate additional items for the record described in section (j). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.10, or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition or cross-petition for review.

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

(1) Form and Length. Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

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

(A) copies of the trial court's rulings entered under Rules 32.13, 32.15, and 32.16; [should this provision include a summary disposition of the notice?]

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

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

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

(3) *Effect of a Motion for Rehearing.* The filing of a motion for rehearing under Rule 32.16 does not limit the issues a party may raise in a petition or cross-petition for review.

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

(d) Appendix Accompanying a Petition or Cross-Petition. Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.

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

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

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

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

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

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

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

with the requirements in subpart (c)(1) and may not include an appendix.

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

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

(i) Stay Pending Appellate Review. The State's filing of a petition for review of an order granting a new trial automatically stays the order until appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting a stay pending further review is within the discretion of the trial court. [Cross-reference Rule 32.14(c).]

(j) 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.

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

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

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

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

Rule 32.17. Stay of Execution of a Death Sentence on a Successive Petition.

If a defendant has been sentenced to death and the Supreme Court has fixed the time for executing the sentence, the superior court may not grant a stay of

execution if the defendant files a successive petition. In those circumstances, the defendant must file an application for a stay with the Supreme Court, and the application must show with particularity any claims that are not precluded under Rule 32.2. If the Supreme Court grants a stay, the Supreme Court clerk must notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

Rule 32.18. 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 32.19. 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 32.20. 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(b)(4). The State must respond to the petition no later than 45 days after it is served.

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

(d) **Court Orders.**

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

- (A) a reasonable probability exists that the defendant would not have been prosecuted, or the defendant's verdict or sentence would have been more favorable if DNA testing would produce exculpatory evidence;
- (B) the evidence is still in existence; and

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

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

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

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

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

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

(e) Test Results.

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

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

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

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

Rule 33.1. Scope of Remedy

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

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

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

Grounds for Relief. Grounds for relief are:

- (a) the defendant's plea or admission to a probation violation was obtained, OR THE SENTENCE WAS IMPOSED, in violation of the United States or Arizona constitutions;
- (b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) ~~the sentence is not in accordance with the sentence~~ IS NOT authorized by law OR BY THE PLEA AGREEMENT;
- (d) the defendant continues to be in custody after his or her sentence expired;
- (e) the existence of newly discovered material facts that probably would have changed the sentence.

Newly discovered material facts exist if:

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

- (h) the defendant presents clear and convincing evidence sufficient to establish that the defendant would not have pled guilty and no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.

COMMENT

Rule 33.1(a). This provision encompasses most traditional post-conviction claims, such as the denial of counsel, incompetent or ineffective counsel, or violations of other rights based on the federal or Arizona constitutions.

Rule 33.1(b). This provision provides a basis to challenge the court's subject matter jurisdiction, which is universally recognized as a ground for post-conviction relief.

Rule 33.1(c).

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

Rule 33.1(h). This claim is independent of a claim under Rule 33.1(e) concerning newly discovered evidence. A defendant who establishes a claim of newly discovered evidence need not comply with the requirements of Rule 33.1(h).

Rule 33.2. Preclusion of Remedy

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

- (1) waived by pleading guilty;
- (2) finally adjudicated on the merits in any previous post-conviction proceeding;
- (3) waived in any previous post-conviction proceeding, except when the claim raises a right of sufficient constitutional magnitude that it requires a knowing, intelligent, and voluntary waiver made personally by the defendant.

(b) Exceptions to Preclusion. A defendant may raise a claim under Rule 33.1(b) through (h) in a successive or untimely post-conviction notice, but the defendant must specifically explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why the defendant did not raise the claim in a previous notice or petition or in a timely manner ~~or in a timely manner~~, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

[New] Comment to Rule 33.2(a)(1).

A pleading defendant waives all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the acceptance of the plea.

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

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

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

COMMENT

This rule provides that all Rule 33 proceedings are to be treated as criminal actions. The characterization of the proceeding as criminal assures compensation for appointed counsel, and the applicability of criminal standards

for admissibility of evidence at an evidentiary hearing, except as otherwise provided.

Rule 33 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq., which provide a remedy for individuals who are unlawfully committed, detained, confined or restrained. A petition or application that has another title, such as petition for a writ of habeas corpus, but which seeks relief that is available under Rule 33, will be treated as a petition for post-conviction relief.

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

- (a) Generally.** A defendant starts a Rule 33 proceeding by filing a Notice Requesting Post-Conviction Relief.
- (b) Notice Requesting Post-Conviction Relief.**
 - (1) *Where to File; Forms.*** The defendant must file a Notice Requesting Post-Conviction Relief in the court where the defendant pled guilty and was sentenced. The court must make "notice" forms available for defendants' use.
 - (2) *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).
 - (3) *Time for Filing.***
 - (A) *Claims Under Rule 33.1(a).*** A defendant must file the notice for a claim under Rule 33.1(a) within 90 days after the oral pronouncement of sentence.
 - (B) *Claims Under Rule 33.1(b) through (h).*** A defendant must file the notice for a claim under Rule 33.1(b)-(h) within a reasonable time after discovering the basis for the claim.
 - (C) *Successive Notice for Claims of Ineffective Assistance of Rule 33 counsel.*** A defendant may raise a claim of ineffective assistance of Rule 33 counsel in a successive Rule 33 proceeding if the defendant files a notice no later than 30 days after the trial court's final order in the first post-conviction proceeding, or if the defendant seeks appellate review of that order, 30 days after the appellate court issues its mandate in that proceeding.

~~(D) *Excusing an Untimely Notice.* The court may excuse an untimely notice of post-conviction relief filed under subpart (3)(A) or (3)(C) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault. [NEED TO DISCUSS THIS WITH THE TASK FORCE.]~~

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

(A) *Superior court.* 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. The clerk must note in the record the date and manner of sending copies of the notice.

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

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

PROPOSED COMMENT TO RULE 33.4(a):

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

Rule 33.5. Appointment of Counsel.

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

(1) the defendant requests it; and

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

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

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

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

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

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

(b) Discovery. After the filing of a notice, the court for good cause 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. [STAFF NOTE: Consider either revising this to raise the required showing or relocating the provision so discovery is allowed only after filing a petition.]

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

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

(2) the specific materials that counsel reviewed;

- (3) the date counsel provided the record to the defendant, and the contents of that record;
- (4) the date(s) counsel discussed the case with the defendant;
- (5) the charges and allegations presented in the complaint, information, or indictment;

The notice must also include an avowal that counsel has considered:

- (6) any potential errors related to the entry of the plea for which there were no objections, but which might rise to the level of fundamental error;
- (7) any determination of the defendant's competency that was raised prior to sentencing;
- (8) any objections raised at the time of sentencing;
- (9) the court's determination of the classification and category of offenses for which the defendant was sentenced under the plea agreement;
- (10) the court's determination of pre-sentence incarceration credit;
- (11) the sentence imposed by the court; and
- (12) any potential claims of ineffective assistance of counsel.

A notice of no colorable claims must also include or incorporate Form ____, with citations to the pertinent portions of the record.

- (d) Defendant's Pro Se Petition.** Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf, 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.
- (e) Counsel's Duties After Filing a Notice Under Section (c).** After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to

acting as advisory counsel until the trial court's final determination in the Rule 33 proceeding.

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

PROPOSED COMMENT TO RULE 33.6(c)

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

Rule 33.7. Petition for Post-Conviction Relief

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

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

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

(3) Time Extensions. For good cause and after considering the rights of the victim, the court may grant a defendant a 30-day extension to file the petition. The court may grant additional 30-day extensions only on a showing of extraordinary circumstances.

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

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

(d) Declaration. A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief. The

declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations.

- (e) **Attachments.** The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.
- (f) **Effect of Non-Compliance.** The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition, so it complies 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 33.8. Transcript Preparation.

- (a) **Request 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.
- (b) **Order Regarding Transcripts.** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant will raise in the petition.
- (c) **Deadlines.** The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no later than 60 days after the entry of an order granting the defendant's request for transcripts.
- (d) **Cost.** If the defendant is indigent, the transcripts must be prepared at county expense.
- (e) **Unavailability of Transcripts.** If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

- (1) **Deadlines.** The State must file its response no later than 45 days after the

defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.

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

(b) Defendant's Reply. The defendant may file a reply 15 days after a response is served. The court for good cause may grant an extension of time.

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

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

Rule 33.10. Assignment of a Judge.

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

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

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

(a) Summary Disposition. If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.

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

(c) Notice to Victim. If the court sets a hearing, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.

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

Rule 33.12. Informal Conference

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

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

Rule 33.13. Evidentiary Hearing

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

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

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

(d) Decision.

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

presented.

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

(A) the conviction, sentence, or detention;

(B) any further proceedings, including 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 33.14. Motion for Rehearing.

(a) Timing and Content. No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

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

(c) Stay. The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court. [Cross-reference Rule 33.16(h)]

(d) Effect on Appellate Rights. Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 34.11.

(e) Disposition if Motion Granted. If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing or grant a new hearing and then either amend or reaffirm its previous ruling. In either case, it must state its

reasons for amending a previous ruling. The State must notify the victim of any action taken by the court if the victim has requested notification.

Rule 33.15 Notification to the Appellate Court.

If an appeal of a defendant's conviction or sentence is pending, defendant's counsel, or if defendant is self-represented, the defendant, must file in the appellate court a notice of any relief granted by the trial court.

Rule 33.16. Petition and Cross-Petition for Review.

(a) Time and Place for Filing.

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

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

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

(4) *Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.* A party may seek an extension of time for filing the petition or cross-petition for review by filing a motion with the trial court, which must decide the motion promptly. If the time for filing the petition or cross-petition for review has expired, the party may request the trial court's permission to file a delayed petition or cross-petition for review. If the court grants the request to file a delayed petition or cross-petition for review, the court must set a new deadline for the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

(b) Notice of Filing and Additional Record Designation. No later than 3 days after a petition or cross-petition for review is filed, the petitioner or cross-petitioner must file with the trial court a "notice of filing." The notice of filing may designate additional items for the record described in section (i). These items may include

additional certified transcripts of trial court proceedings prepared under Rule 33.8, or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition or cross-petition for review.

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

(1) *Form and Length.* Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

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

(A) copies of the trial court's rulings entered under Rules 33.11, 33.13, and 33.14; [should this provision include a summary disposition of the notice?]

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

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

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

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

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

(c) Appendix Accompanying a Petition or Cross-Petition. Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except

the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.

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

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

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

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

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

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

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

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

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

(h) Stay Pending Appellate Review. The State's filing of a petition for review of an order granting a new trial automatically stays the order until

appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting a stay pending further review is within the discretion of the trial court. [Cross-reference Rule 33.14(c).]

(i) Transmitting the Record to the Appellate Court. No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record. 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.

(j) 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. [Lacey's suggested edits.]

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

(l) 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~~.

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

Rule 33.17. Extensions of Time; Victim Notice and Service [Question: does this rule apply only to capital cases? If so, it could be removed from Rule 33.]

(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 33.18. 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 33.4(b)(4). The State must respond to the petition no later than 45 days after it is served.

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

(d) **Court Orders.**

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

- (A)** a reasonable probability exists that the defendant would not have been prosecuted, or the defendant's verdict or sentence would have been more favorable if DNA testing would produce exculpatory evidence;
- (B)** the evidence is still in existence; and
- (C)** the evidence was not previously subjected to DNA testing, or the evidence was not subjected to the type of DNA testing that defendant now requests and the requested testing may resolve an issue not resolved by previous testing.

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

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

- (A)** the type of DNA analysis to be used;
- (B)** the procedures to be followed during the testing; and
- (C)** the preservation of some of the sample for replicating the testing.

(e) Test Results.

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

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

(f) Preservation of Evidence. If a defendant files a petition under this rule,

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

(g) Unfavorable Test Results. If the results of the post-conviction DNA testing are not favorable to the defendant, the court must dismiss without a hearing any DNA-related claims asserted under Rule 32.1 or Rule 33.1. The court may make further orders as it deems appropriate, including orders:

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

(h) Favorable Test Results. Notwithstanding any other provision of law that would bar a hearing as untimely, the court must order a hearing and make any further orders that are required by statute or the Arizona Rules of Criminal Procedure if the results of the post-conviction DNA testing are favorable to the defendant. If there are no material issues of fact, the hearing need not be an evidentiary hearing, but the court must give the parties an opportunity to argue why the defendant should or should not be entitled to relief under Rule 33.1 as a matter of law.

COMPARE NOV 9 RULE 32 TO AUG 31 RULE 32

Rule 32. Post-Conviction Relief ~~{August 31 for Defendants SENTENCED FOLLOWING A Trial [November 9, 2018 meeting version w/subsequent workgroup 1 revisions]}~~

Rule 32.1. Scope of Remedy

~~**Petition for Relief.** Subject to Rules 32.2 and 32.4(a)(2),~~ **Generally.** A defendant may file a notice requesting post-conviction relief under this rule if the defendant was convicted of, or and sentenced for, a criminal offense may file after a trial, or in any case in which the defendant was sentenced to death.

~~**No Filing Fee.** There is no fee for filing a notice of post-conviction relief, 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~~ exceeds the ~~sentence~~ maximum authorized by law;
- (d) the defendant continues to be in custody after his or her sentence expired;
- (e) the existence of newly discovered material facts ~~probably exist and those facts that~~ 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 such critical significance ~~such~~ that the impeachment 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 presents 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)-.], and still open for discussion.

COMMENT

Rule 32.1(a). This provision encompasses most traditional ~~collateral attacks are encompassed within this provision. Claims of post-conviction claims, such as the~~ denial of counsel, ~~of incompetency of incompetent or ineffective~~ counsel, ~~and of violation or violations~~ of other rights based on the federal or Arizona constitutions ~~are included.~~

Rule 32.1(b). This provision ~~retains~~ provides a basis to challenge the ~~basic attack on~~ court's subject matter jurisdiction, which is universally recognized as a ground for ~~collateral attack~~ post-conviction relief.

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

Rule 32.1(d). This provision is intended to include claims such as miscalculation of sentence or computation of good time credits that result in the defendant remaining in custody when he or she should be free. It 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) ~~concerning newly discovered evidence.~~ A defendant who establishes a claim of newly discovered evidence ~~does need~~ 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 32.1(a) based on any ground:

- (1) still ~~raisable~~ raiseable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;
- (2) finally adjudicated on the merits in an appeal or in any previous ~~collateral~~ post-conviction proceeding; or
- (3) waived at trial or on appeal, ~~and not raised or~~ in any previous ~~collateral~~ post-conviction proceeding, except when the claim raises a ~~right of sufficient~~ constitutional ~~magnitude~~ right that ~~it requires a knowing, intelligent, and voluntary waiver made can only be waived knowingly, voluntarily, and~~ personally by the defendant.

(b) Exceptions. ~~Rule 32.2(a) does not apply to~~ Claims for relief based on Rule 32.1(b) through (h) ~~are not subject to preclusion under Rule 32.2(a).~~ However, a claim under Rule

32.1(b) through (h) that a 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 notice or petition ~~or in a timely manner~~, the court may summarily dismiss the notice. A court at any time, ~~a court~~ may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

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, Other Applications or Requests for Relief.~~ If a court ~~having jurisdiction over a defendant's person~~ receives any type of application for a writ of habeas corpus raising any claim or request for relief that ~~attacks~~ challenges the validity of the defendant's conviction or sentence following a trial, and if that court is not the court that convicted or sentenced the defendant, it must transfer the application or request for relief to the court where the defendant was convicted or sentenced. 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.~~

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

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., which provides a remedy for individuals who are unlawfully~~

committed, detained, confined, or restrained. BUT IF A CONVICTED DEFENDANT FILES A PETITION FOR A WRIT OF HABEAS CORPUS (OR AN APPLICATION WITH A DIFFERENT TITLE) THAT ~~petition or application that has another title, such as petition for a writ of habeas corpus, but which seeks relief that is available under Rule 32,~~ THE PETITION OR APPLICATION will be treated as a petition for post-conviction relief.

Rule 32.4. Filing ~~of a~~ Notice ~~and Petition, and Other Initial Proceedings~~ Notice of Requesting Post-Conviction Relief:

(a) Filing. Generally. A defendant starts a ~~post-conviction~~ Rule 32 proceeding by filing a Notice ~~of Requesting Post-Conviction Relief.~~

(b) Notice Requesting Post-Conviction Relief

(1) **Where to File; Forms.** A defendant must file a notice requesting post-conviction relief in the court where the defendant was convicted, ~~and sentenced.~~ The court must make "notice" forms available for defendants' use.

(2) **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).

~~(2)~~(3) **Time for Filing.**

~~(A)~~ **Generally. In filing Claims under Rule 32.1(a notice,).** A defendant must ~~follow the deadlines set forth~~ file the notice for a claim under Rule 32.1(a) within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the order and mandate in ~~this rule. These deadlines do not apply to the direct appeal, whichever is later.~~

~~(A)~~(B) **Claims under Rule 32.1(b) through (h).** A defendant must file the notice for a claim under Rule 32.1(b) through (h) within a reasonable time after discovering the basis of the claim. [COMMENT FROM J. MCMURDIE: HOW ABOUT WITHIN 90 DAYS AFTER DISCOVERING THE BASIS OF THE CLAIM? REASONABLE SEEMS TO BE TOO DISCRETIONARY.]

~~(B)~~(C) **Time for Filing a Notice in a Capital Case.** In a capital case, the Supreme Court clerk must expeditiously file a notice of post-

conviction relief with the trial court upon the issuance of the mandate affirming the defendant's conviction and sentence on direct appeal.

~~(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)(D) *Excusing an Untimely Notice.* The court may excuse an untimely notice of post conviction relief if filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a the notice was not the defendant's fault or the grounds were not known to the defendant within the required time. [NEED TO DISCUSS THIS WITH THE TASK FORCE.]~~

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

~~(A)(B) *Justice or Municipal Court.* If the conviction occurred in a limited jurisdiction court, the clerk for upon receiving a notice from a defendant, the limited jurisdiction court clerk must send a copy of the~~

notice to the prosecuting attorney who represented the State at trial, and to ~~a defended~~defendant's counsel or ~~athe~~ 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)~~(C) Notice to an Appellate Court. If an appeal of the defendant's conviction or sentence is pending, the clerk must send a copy of the notice of post-conviction relief to the appropriate appellate court within 5 days of its filing and must note in the record the date and manner of sending the copy. The clerk also must send a copy of any final ruling **GRANTING RELIEF** in the post-conviction proceeding to the appropriate appellate court, as provided in Rule ~~32~~34.9(e).

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

PROPOSED COMMENT TO RULE 32.4(a):

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

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

If a petition is filed while an appeal is pending, the appellate court, under Rule 31.3(b), may suspend the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment or sentence. See Rule 31.4(b) (requiring consolidation unless good cause exists not to do so).

Rule 32.5. Appointment of Counsel.

(a) **Noncapital Cases.** No later than 15 days after the filing of a notice of a defendant's timely first Rule 32 proceeding, the presiding judge must appoint counsel for the defendant if:

(1) the defendant requests it; and

(2) there has been a previous determination that the defendant is indigent, or the defendant has completed an affidavit of indigency AND THE COURT FINDS THAT THE DEFENDANT IS INDIGENT.

Upon the filing of all other notices in a noncapital case, the presiding judge may appoint counsel for an indigent defendant if requested.

~~(a)~~**(b) Capital Cases.** After the Supreme Court has affirmed aaN INDIGENT capital defendant's conviction and sentence, ~~the Supreme Court or its designee~~ 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, If~~ the Supreme Court ~~may authorize~~has authorized 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.

~~(6) 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.~~

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

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

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

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

(b) **Discovery.** After the filing of a notice, the court for good cause 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. [NOTE: The Task Force should consider either revising this by raising the required showing for pre-petition discovery or relocating the provision so discovery is allowed only after filing a petition.]

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

- (1) a summary of the facts and procedural history of the case;
- (2) the specific materials that counsel reviewed;
- (3) the date counsel provided the record to the defendant, and the contents of that record;
- (4) the date(s) counsel discussed the case with the defendant;
- (5) the charges and allegations presented in the complaint, information, or indictment.

The notice must also include an avowal that counsel has reviewed and considered:

- (6) any adverse pretrial rulings affecting the course of trial (e.g., motions to suppress, motions *in limine*, motions to quash, speedy trial motions);
- (7) any adverse rulings during trial on objections or motions (e.g., objections regarding the admission or exclusion of evidence, objections premised on prosecutorial or judicial misconduct, mistrial motions, motions for directed verdict);
- (8) any adverse rulings on post-trial motions (e.g., motion for a new trial, motion to vacate judgment);
- (9) issues regarding jury selection, if the trial was to a jury;

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

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

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

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

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

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

(16) the sentence imposed by the court;

(17) issues raised by appellate counsel; and

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

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

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

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

PROPOSED COMMENT TO RULE 32.6(c)

Rule 32.6(c) is intended to assist counsel in reviewing the record to ensure that

substantial justice is done. Failure to complete Form , or to identify any issues listed in Rules 32.6(c) does not constitute a *per se* deviation from prevailing professional norms to the extent a pleading defendant possesses a right to effective post conviction counsel under Arizona law. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Rule 32.7. Petition for Post-Conviction Relief.

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

(1) Noncapital Cases.

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

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

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

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

(1)(2) Capital Cases.

(A) Filing Deadline for First Petition. Generally. In a capital case, the defendant must file a petition no later than 12 months after the first notice is filed.

(B) Filing Deadline for Any Successive Petition. On a successive notice in a capital case, the defendant must file the petition no later than 30 days after the notice is filed.

(C) Time Extensions. For good cause, the court may grant a capital defendant one 60-day extension in which to file a petition. For good cause and after considering the rights of the victim, the court may grant additional 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 thereafter until a petition is filed.

~~(1) *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:~~

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

~~(2) the specific materials that counsel reviewed;~~

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

~~(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 and Checklist.~~
- ~~• Fifth Circuit Court of Appeals Guidelines and Checklist.~~
- ~~• Texas 13th Court of Appeals Guidelines.~~
- ~~• Texas 14th Court of Appeals Guidelines and Checklist.~~

~~(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. If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).~~
 - ~~(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. The provisions Rules 10.1 and 10.2 apply to Rule 32 post-conviction proceedings when the~~

~~case is assigned to a new judge.~~

~~(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

(b) Form of Petition. A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum

that contains citations to relevant portions of the record and to relevant legal authorities.

- (c) **Length of Petition.** ~~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.~~

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

(2) Capital Cases. In capital cases, the petition must not exceed 80 pages.

- (d) **Declaration.** A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief. The declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations.
- (e) **Attachments.** The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the ~~petition's~~ allegations in the petition.
- (f) **Effect of Non-Compliance.** The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition ~~to comply, so it complies~~ 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
8. Transcript Preparation.

(a) Request 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.

(b) Order Regarding Transcripts. The court must promptly review the defendant's request and order the preparation of only those transcripts it deems

necessary for resolving issues the defendant will raise in the petition.

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

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

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

Rule 32.9. Response and Reply; Amendments

(a) State's Response.

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

~~(1)~~(2) **Contents.** The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

~~(a) 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~~ The defendant may file a reply 15 days after a response is served, ~~the defendant may file a reply.~~ The court ~~may~~ for good cause may grant an extension of time.

(c) Length of Response and Reply.

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

(4) Capital Cases. In capital cases, the State's response must not exceed 80 pages, and defendant's reply must not exceed 40 pages.

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

Review and

Rule 32.10. Assignment of a Judge.

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

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

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

(a) **Summary Disposition.** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.

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

(c) **Notice to Victim.** If the court sets 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.

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

Rule 32.712. 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~~ requesting post-conviction relief.

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

Rule 32.813. Evidentiary Hearing

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

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

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

(d) **Decision.**

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

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

(A) the conviction, sentence, or detention;

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

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

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

Rule 32.9. Review

Filing of a 14. Motion for Rehearing.

(a) **Timing and Content.** No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

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

is served.

(c) Stay. The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court. [Cross-reference Rule 32.18(i).]

~~(e)~~(d) **Effect on Appellate Rights.** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under ~~(e)~~Rule 32.18.

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

Rule 32.15. 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~~ a notice of any relief granted by the trial court ~~granted or denied relief.~~

Rule 32.16. Petition and Cross-Petition for Review.

(a) Time and Place for Filing.

- (1) *Petition.* No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (2) *Cross-Petition.* The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.
- (3) *Place for Filing.* The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.

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

(A) ~~(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.

~~(i)~~**(B)** If the time for filing the petition or cross-petition for review has expired, the party may ~~seek leave by request~~ the trial ~~court~~court's permission to file a delayed petition or cross-petition for review. If the ~~trial~~ court grants the ~~party leave request~~ 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.

(2b) 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/or~~ cross-petitioner must file with the ~~trial~~trial court a “notice of filing.” The notice of filing may designate additional items for the record described in ~~(h)~~section (j). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.4~~(e)~~10, or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition or cross-petition for review.

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

(1) *Form and Length.* Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

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

(A) copies of the trial court's rulings entered under Rules 32.6~~(d)~~, ~~32.8(d) and 32.9(b)~~13, 32.15, and 32.16; [should this provision

include a summary disposition of the notice?

- (B) a statement of issues the trial court decided that the defendant is presenting for appellate review;
- (C) a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and
- (D) reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

~~(3)~~ *Effect of a Motion for Rehearing.* The filing of a motion for rehearing under

~~(4)~~~~(3)~~ (a) Rule 32.16 does not limit the issues a party may raise in a petition or cross-petition for review.

~~(5)~~~~(4)~~ Waiver. A party's failure to raise any issue that could be raised in the petition or cross-petition for review constitutes a waiver of appellate review of that issue.

(d) **Appendix Accompanying a Petition or Cross-Petition.** Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements. ~~{Lacey's suggested edits.}~~

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

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

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

~~(i) Time and Place for Filing (A)~~ No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may

file a response in the appellate court. Rule 31.3(d) governs computation of the deadline for filing the response.

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

~~(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 , identifying who was served and the date and manner of service.~~

~~(C)(2) Form and Length. of Response. The response must not exceed 6,000 words if typed and 22 pages if handwritten, exclusive of an appendix, and must comply with the form requirements in (d)(3)(A).subpart (c)(1) An appendix to a response must comply with the form and substantive requirements in section (d)(3)(B).~~

~~(D3) 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)subpart (c)(1) 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).~~

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

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

(i) **Stay Pending Appellate Review.** The State's filing of ~~a 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.~~ [Cross-

reference Rule 32.14(c).]

(j) 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.

(k) ~~–[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. [Lacey’s suggested edits.]

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

(m) 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~~.

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

Rule 32.1017. Stay of Execution of a Death Sentence on a Successive Petition.

If a defendant has been sentenced to death and the Supreme Court has fixed the time for executing the sentence, the superior court may not grant a stay of execution if the defendant files a successive petition. In those circumstances, the defendant must file an application for a stay with the Supreme Court, and the application must show with particularity any claims that are not precluded under Rule 32.2. If the Supreme Court grants a stay, the Supreme Court clerk must notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

Rule 32.18. 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~~19. 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~~20. 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(ab)(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 DNA Testing.~~** After considering the petition and the State's response, the court must order DNA testing if the court finds that:

(A) a reasonable probability exists that the defendant would not have been prosecuted, or ~~convicted if exculpatory results had the defendant's verdict or sentence would have been obtained through more favorable if DNA testing would produce exculpatory evidence;~~

(B) the evidence is still in existence; and

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

~~(2) **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)~~(2) **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)~~(3) **Other Orders.** The court may enter any other appropriate orders, including orders requiring elimination samples from third parties and designating:

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

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

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

(e) Test Results.

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

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

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

(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.

COMPARE NOV 9 RULE 33 TO AUG 31 RULE 32

Rule ~~32~~33. Post-Conviction Relief ~~{August 31 for a Defendant Who Pled Guilty or Admitted a Probation Violation [November 9, 2018 meeting version w/subsequent workgroup 1 revisions]}~~

Rule ~~32~~33.1. Scope of Remedy

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

~~Of-Right Petition.~~ A if the 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.~~

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

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

Grounds for Relief. Grounds for relief are:

- (a) the defendant's ~~conviction~~ plea or admission to a probation violation was obtained ~~or the sentence was imposed~~, 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~~ exceeds the ~~sentene~~ maximum authorized by law;
- (d) the defendant continues to be in custody after his or her sentence expired;
- (e) the existence of newly discovered material facts ~~probably exist and those facts that~~ 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 such critical significance ~~such~~ that the impeachment evidence probably would have changed the ~~verdict or~~ sentence.
- (f) the failure to timely file a notice of appeal post-conviction relief 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~~presents clear and convincing evidence ~~that the facts underlying the claim would be~~ sufficient to establish that the defendant would not have pled guilty and 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 3233.1(a). ~~This provision encompasses most traditional collateral attacks are encompassed within this provision. Claims of post-conviction claims, such as the denial of counsel, of incompetency of incompetent or ineffective counsel, and of violation or violations of other rights based on the federal or Arizona constitutions are included.~~

Rule 3233.1(b). This provision ~~retains the basic attack on~~provides a basis to challenge the court's subject matter jurisdiction, which is universally recognized as a ground for ~~collateral attack~~post-conviction relief.

Rule 3233.1(c). This provision ~~is intended~~provides a basis to ~~allow an attack on~~challenge a sentence even though the petitioner does not contest the validity of the underlying conviction.

~~Rule 32.1(d). This provision~~**Rule 33.1(d).** This provision is intended to include claims such as miscalculation of sentence or computation of good

~~time credits that result in the defendant remaining in custody when he or she should be free. It 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 3233.1(h). This claim is independent of a claim under Rule 3233.1(e) ~~concerning newly discovered evidence.~~ A defendant who establishes a claim of newly discovered evidence ~~does need~~ not ~~need to~~ comply with the requirements of Rule 3233.1(h).

Rule 3233.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 3233.1(a) based on any ground:

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

~~(1) waived by pleading guilty;~~

~~(1)(2)~~ (2) finally adjudicated on the merits in ~~an appeal or in~~ any previous ~~collateral post-conviction~~ proceeding; ~~or~~

~~(2)(3)~~ (3) waived ~~at trial or on appeal, and not raised~~ in any previous ~~collateral post-conviction~~ proceeding, except when the claim raises a right of sufficient constitutional magnitude that it 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(b) through (h).~~ **Preclusion.** A defendant may raise a claim under Rule 3233.1(b) through (h) ~~that defendant raises~~ in a successive or untimely post-conviction notice, but the defendant must specifically explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why the defendant did not raise the claim in a previous notice or petition or in a timely manner ~~or in a timely manner~~, the court may summarily dismiss the notice. At any time, a court may determine by

a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

[New] Comment to Rule 3233.2(a)(1).

A pleading defendant waives all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the acceptance of the plea.

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

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

(b) ~~Habeas Corpus.~~**Other Applications or Requests for Relief.** If a court ~~having jurisdiction over a defendant's person~~ receives any type of application for a writ of habeas corpus raising any claim or request for relief that ~~attacks~~challenges the validity of the defendant's ~~conviction or plea or admission of a probation violation, or a sentence following entry of a plea or admission of a probation violation,~~ and if that court is not the court that ~~convicted or entered the plea or admission and~~ sentenced the defendant, it must transfer the application or request for relief 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 ~~3233~~ 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~~ **Rule 33** does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. See A.R.S. §§ 13-4121 et seq. ~~(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., which provide a remedy for individuals who are unlawfully committed, detained, confined or restrained. A petition or application that has another title, such as petition for a writ of habeas corpus, but which seeks relief that is available under Rule 33, will be treated as a petition for post-conviction relief.~~

Rule 33.4. Filing of a Notice and Petition, and Other Initial Proceedings
Notice of Requesting Post-Conviction Relief.

(a) Filing Generally. A defendant starts a ~~post conviction~~ **Rule 33** proceeding by filing a Notice ~~of~~ **Requesting Post-Conviction Relief.**

(b) Notice Requesting Post-Conviction Relief.

(1) Where to File; Forms. The defendant must file a **Notice Requesting Post-Conviction Relief** in the court where the defendant **pled guilty and was convicted/sentenced.** The court must make "notice" forms available for defendants' use.

~~(1) 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 or the grounds were not known to the defendant within the required time.~~

(2) ***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).

(3) *Time for Filing.*

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

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

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

~~(D) *Excusing an Untimely Notice.* The court may excuse an untimely notice of post conviction relief filed under subpart (3)(A) or (3)(C) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault. [NEED TO DISCUSS THIS WITH THE TASK FORCE.]~~

~~(3)~~(4) *Duty of the Clerk upon Receiving a Notice.*

~~(A)~~(A) *Generally. Superior court.* 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. The clerk must note in the record the date and manner of sending copies of the notice.

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

~~(F)~~ *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).~~

~~(4)~~(5) *Duty of the State upon Receiving a Notice.* Upon receiving a copy of a notice, the State must notify any victim who has requested notification of post- conviction proceedings.

PROPOSED COMMENT TO RULE 33.4(a):

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

Rule 33.5. Appointment of Counsel.

~~(2) *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.~~

~~(a) Noncapital Cases. Generally. No later than 15 days after the **filing of a notice of a defendant's** defendant has timely filed a notice under Rule 33.4(b)(3)(A) or **first Rule 32 proceeding, 33.4(b)(3)(C).** the presiding judge must appoint counsel for the defendant if: ~~(A)~~~~

~~_____~~
~~_____ (1) the defendant requests it; and **(B) the judge**~~

~~(2) there has **previously determined** been a previous determination that the defendant is indigent, or the defendant has completed an affidavit of indigency, and the court finds that the defendant is indigent.~~

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

~~(a)(b) Appointment of 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.~~

~~**(b) 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 and Checklist.~~
- ~~• Fifth Circuit Court of Appeals Guidelines and Checklist.~~
- ~~• Texas 13th Court of Appeals Guidelines.~~
- ~~• Texas 14th Court of Appeals Guidelines and Checklist.~~

~~(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. If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).~~
- ~~(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 (e) is extended by the time between the request and either the transcripts' final preparation or the court's denial of the request.~~

~~(b)(c) **Attorney-Client Privilege and Confidentiality for the Defendant.** The defendant's prior counsel must share all files and other communications with post-~~

conviction counsel. This sharing of information does not waive the attorney-client privilege or confidentiality claims.

~~(f) **Assignment of a Judge.** The presiding judge must, if possible, assign a proceeding for post conviction relief to the sentencing judge. The provisions Rules 10.1 and 10.2 apply to Rule 32 post conviction proceedings when the case is assigned to a new judge.~~

~~(h)~~

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

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

~~(a)(b) **Discovery.** After the filing of a notice, the court, upon for 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.~~

[STAFF NOTE: Consider either revising this to raise the required showing or relocating the provision so discovery is allowed only after filing a petition.]

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

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

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

(2) the specific materials that counsel reviewed;

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

(4) the date(s) counsel discussed the case with the defendant;

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

The notice must also include an avowal that counsel has considered:

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

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

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

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

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

(11) the sentence imposed by the court; and

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

A notice of no colorable claims must also include or incorporate Form ____, with citations to the pertinent portions of the record.

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

(e) **Counsel's Duties After Filing a Notice Under Section (c).** After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to

acting as advisory counsel until the trial court's final determination in the Rule 33 proceeding.

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

PROPOSED COMMENT TO RULE 33.6(c)

~~**Rule 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~~

Rule 33.6(c) is 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), 33.6(c) does not constitute a *per se* deviation from prevailing professional norms to the extent a pleading defendant possesses a right to effective post-conviction counsel under Arizona law. See *Strickland v. Washington*, 466 U.S. 668 (1984).

~~—*Washington*, 466 U.S. 668 (1984).~~

Rule 32.5. Contents of 33.7. Petition for Post-Conviction Relief

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

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

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

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

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

- (b) **Form of Petition.** A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.
- (c) **Length of Petition.** ~~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~~ The petition must not exceed 28 pages.
- (d) **Declaration.** A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief. The declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations.
- (e) **Attachments.** The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the ~~petition's~~ allegations in the petition.
- (f) **Effect of Non-Compliance.** The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition ~~to comply, so it complies~~ 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**33.8. Transcript Preparation.**

(a) Request 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.

(b) Order Regarding Transcripts. The court must promptly review the

defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant will raise in the petition.

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

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

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

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

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

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

~~(1) 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** Defendant's Reply.~~ No later than ~~The~~ defendant may file a reply 15 days after a response is served, ~~the defendant may file a reply.~~ The court ~~may~~ for good cause may grant an extension of time.

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

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

~~**Review and**~~

~~**Rule 33.10. Assignment of a Judge.**~~

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

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

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

~~(a) **Summary Disposition.**~~ If, after identifying all precluded and untimely

claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.

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

(c) Notice to Victim. If the court sets 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.

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

Rule ~~32.733.12~~. Informal Conference

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

~~**(a) 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.~~

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

Rule ~~32.833.13~~. Evidentiary Hearing

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

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

testify.

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

(d) **Decision.**

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

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

(A) the conviction, sentence, or detention;

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

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

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

Rule 32.9. Review

Filing of a 33.14. Motion for Rehearing.

(a) **Timing and Content.** No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

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

(c) Stay. The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court. [Cross-reference Rule 33.16(h)]

~~(e)~~(d) Effect on Appellate Rights. Filing of a motion for rehearing is not a prerequisite to filing a petition for review under ~~(e)~~Rule 34.11.

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

Rule 33.15 Notification to the Appellate Court.

If 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~~ a notice of any relief granted by the trial court ~~granted or denied relief.~~

Rule 33.16. Petition and Cross-Petition for Review.

(a) Time and Place for Filing.

- (1) *Petition.* No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (2) *Cross-Petition.* The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.
- (3) *Place for Filing.* The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.

~~(A)~~ *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.

(4) ~~(ii)~~ If the time for filing the petition or cross-petition for review has expired, the party may ~~seek leave by request~~ the trial ~~court~~court's permission to file a delayed petition or cross-petition for review. If the ~~trial~~ court grants the ~~party leave request~~ 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.

(2b) 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/or~~ cross-petitioner must file with the ~~trial~~trial court a “notice of filing.” The notice of filing may designate additional items for the record described in ~~(A)~~section (i). These items may include additional certified transcripts of trial court proceedings prepared under Rule ~~32.4(e);33.8~~, or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition or cross-petition for review.

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

(1) *Form and Length.* Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

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

(A) copies of the trial court's rulings entered under Rules ~~32.6(d); 32.8(d);33.11, 33.13, and 32.9(b);33.14~~; [should this provision include a summary disposition of the notice?]

- (B) a statement of issues the trial court decided that the defendant is presenting for appellate review;
- (C) a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and
- (D) reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

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

- (3) ~~(a)~~ Rule 33.14 does not limit the issues a party may raise in a petition or cross-petition for review.
- (4) *Waiver.* A party's failure to raise any issue that could be raised in the petition or cross-petition for review constitutes a waiver of appellate review of that issue.

(c) Appendix Accompanying a Petition or Cross-Petition. Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements. ~~{Lacey's suggested edits.}~~

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

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

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

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

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

~~(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 , identifying who was served and the date and manner of service.~~

~~(C)(2) Form and Length. of Response. The response must not exceed 6,000 words if typed and 22 pages if handwritten, exclusive of an appendix, and must comply with the form requirements in (d)(3)(A).subpart (c)(1) An appendix to a response must comply with the form and substantive requirements in section (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)subpart (c)(2) 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).~~~~

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

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

(h) Stay Pending Appellate 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.~~ [Cross-reference Rule 33.14(c).]

(i) Transmitting the Record to the Appellate Court. No later than 45 days after receiving a notice of filing under ~~(e)(2)~~section (b), 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.

(j) ~~–[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. [Lacey’s suggested edits.]

(k) **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~~section (k)~~).~~

(l) **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.~~

(m) **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**~~

~~**Rule 33.17. Extensions of Time; Victim Notice and Service [Question: does this rule apply only to capital cases? If so, it could be removed from Rule 33.]**~~

(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~~33.18. 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~~33.4(ab)(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 DNA Testing.** After considering the petition and the State's response, the court must order DNA testing if the court finds that:

(A) a reasonable probability exists that the defendant would not have been prosecuted, or ~~convicted if exculpatory results had the defendant's verdict or sentence would have been obtained through more favorable if~~ DNA testing would produce exculpatory evidence;

(B) the evidence is still in existence; and

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

~~(1) **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.~~

(2) **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.

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

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

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

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

(e) Test Results.

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

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

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

(g) *Unfavorable Test Results.* If the results of the post-conviction DNA testing are not favorable to the defendant, the court must dismiss without a hearing any DNA-related claims asserted under Rule 32.1- or Rule 33.1. The court may make further orders as it deems appropriate, including orders:

- (1)** notifying the Board of Executive Clemency or a probation department;
- (2)** requesting to add the defendant's sample to the federal combined DNA index system offender database; or
- (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~~33.1 as a matter of law.

COMPARE NOV 9 RULE 32 TO NOV 9 RULE 33

Rule ~~3332~~. Post-Conviction Relief for ~~a Defendant Who Pled Guilty or Admitted a Probation Violation~~ Defendants SENTENCED FOLLOWING A Trial [November 9, 2018 meeting version]

Rule ~~3332~~.1. Scope of Remedy

Generally. A defendant may file a notice requesting post-conviction relief under this rule if the defendant ~~pled guilty or no contest, admitted a probation violation, or had an automatic probation violation based on a plea of guilty or no contest.~~ was convicted and sentenced for a criminal offense after a trial, or in any case in which the defendant was sentenced to death.

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

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

Grounds for Relief. Grounds for relief are:

- (a) the defendant's ~~plea or admission to a probation violation~~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;
- (d) the defendant continues to be in custody after his or her sentence expired;
- (e) the existence of newly discovered material facts that 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 such critical significance that the impeachment evidence probably would have changed the verdict or sentence.

(f) the failure to timely file a notice of ~~post-conviction relief~~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 presents clear and convincing evidence sufficient to establish that no reasonable fact-finder would find the defendant ~~would not have pled~~ guilty ~~and of the offense beyond a reasonable doubt, [or that~~ no reasonable fact-finder would find the defendant ~~guilty of the offense beyond a reasonable doubt.~~ 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), and still open for discussion.]

COMMENT

Rule 3332.1(a). This provision encompasses most traditional post-conviction claims, such as the denial of counsel, incompetent or ineffective counsel, or violations of other rights based on the federal or Arizona constitutions.

Rule 3332.1(b). This provision provides a basis to challenge the court's subject matter jurisdiction, which is universally recognized as a ground for post-conviction relief.

Rule 3332.1(c). This provision provides a basis to challenge a sentence even though the petitioner does not contest the validity of the underlying conviction.

Rule 3332.1(d). This provision is intended to include claims such as miscalculation of sentence or computation of good time credits that result in the defendant remaining in custody when he or she should be free. It is not intended to include attacks on the conditions of imprisonment or on correctional practices or prison rules.

Rule 3332.1(h). This claim is independent of a claim under Rule 3332.1(e) concerning newly discovered evidence. A defendant who establishes a claim of newly discovered evidence need not comply with the requirements of Rule 3332.1(h).

Rule 3332.2. Preclusion of Remedy

(a) Preclusion. A defendant is precluded from relief under Rule 3332.1(a) based on any ground:

~~(1) waived by pleading guilty;~~

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

~~(1)(2)~~ (2) finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding; or

~~(2)(3)~~ (3) waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a ~~right of sufficient~~ constitutional ~~magnituderight~~ right that ~~it requires a knowing, intelligent~~ can only be waived knowingly, voluntarily, and ~~voluntary waiver made~~ personally by the defendant.

(b) Exceptions. Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion. A defendant may raise under Rule 32.2(a). However, a claim under Rule ~~33.~~

~~32.1(b) through (h) that a defendant raises~~ in a successive or untimely post-conviction notice, ~~but the defendant~~ must ~~specifically~~ explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why ~~the~~ defendant did not raise the claim in a previous notice or petition ~~or in a timely manner or in a timely manner,~~ the court may summarily dismiss the notice. A court at any time, ~~a court~~ may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

~~[New] Comment to Rule 33.2(a)(1).~~

~~A pleading defendant waives all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the acceptance of the plea.~~

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

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

motions and habeas corpus.

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

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

COMMENT

This rule provides that all Rule 3332 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 3332 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq., which ~~provide~~provides a remedy for individuals who are unlawfully committed, detained, confined, or restrained. **BUT IF A CONVICTED DEFENDANT FILES A PETITION FOR A WRIT OF HABEAS CORPUS (OR AN APPLICATION WITH A DIFFERENT TITLE) THAT** ~~petition or application that has another title, such as petition for a writ of habeas corpus, but which~~ seeks relief that is available under Rule 33,32, **THE PETITION OR APPLICATION** will be treated as a petition for post-conviction relief.

Rule 3332.4. Filing a Notice Requesting Post-Conviction Relief

(a) Generally. A defendant starts a Rule 3332 proceeding by filing a Notice Requesting Post-Conviction Relief.

(b) Notice Requesting Post-Conviction Relief.

(1) *Where to File; Forms.* ~~The~~A defendant must file a notice requesting

post-conviction relief in the court where the defendant ~~pled guilty was~~ convicted and ~~was~~-sentenced. The court must make "notice" forms available for defendants' use.

(2) ***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).

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

(A) *Claims under Rule ~~3332~~.1(a).* A defendant must file the notice for a claim under Rule ~~3332~~.1(a) within 90 days after the oral pronouncement of sentence. or within 30 days after the issuance of the order and mandate in the direct appeal, whichever is later.

(B) *Claims under Rule ~~3332~~.1(b) through (h).* A defendant must file the notice for a claim under Rule ~~3332~~.1(b) ~~through (h)~~ within a reasonable time after discovering the basis ~~for~~of the claim. [COMMENT FROM J. MCMURDIE: HOW ABOUT WITHIN 90 DAYS AFTER DISCOVERING THE BASIS OF THE CLAIM? REASONABLE SEEMS TO BE TOO DISCRETIONARY.]

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

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

~~(D) *Excusing an Untimely Notice.* The court may excuse an untimely notice of post-conviction relief filed under subpart (3)(A) or (3)(C) if the defendant adequately explains why the failure to timely file a the notice was not the defendant's fault. [NEED TO DISCUSS THIS WITH THE TASK FORCE.]~~

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

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

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

(C) *Notice to an Appellate Court.* If an appeal of the defendant's conviction or sentence is pending, the clerk must send a copy of the notice of post-conviction relief to the appropriate appellate court within 5 days of its filing and must note in the record the date and manner of sending the copy. The clerk also must send a copy of any final ruling GRANTING RELIEF in the post-conviction proceeding to the appropriate appellate court, as provided in Rule 34.9.

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

PROPOSED COMMENT TO RULE ~~3332~~ 32.4(a):

A Notice ~~of~~ Requesting Post-Conviction Relief informs the trial court of a possible need to appoint an attorney for the defendant ~~underas~~ provided in Rule ~~3332~~ 32.5(a). The Notice ~~of~~ Requesting Post-Conviction Relief also assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

Rule ~~33~~ COMMENT TO RULE 32.4(b)(4)(C)

If a petition is filed while an appeal is pending, the appellate court, under Rule 31.3(b), may suspend the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment

or sentence. See Rule 31.4(b) (requiring consolidation unless good cause exists not to do so).

Rule 32.5. Appointment of Counsel.

(a) ~~Generally.~~**Noncapital Cases.** No later than 15 days after the ~~defendant has~~ timely filed filing of a notice ~~under Rule 33.4(b)(3)(A) or Rule 33.4(b)(3)(C), of a~~ defendant's timely first Rule 32 proceeding, the presiding judge must appoint counsel for the defendant if:

- (1) the defendant requests it; and
- (2) there has been a previous determination that the defendant is indigent, or the defendant has completed an affidavit of indigency; **AND THE COURT FINDS THAT THE DEFENDANT IS INDIGENT.**

Upon the filing of all other ~~Rule 33-~~notices in a noncapital case, the presiding judge may appoint counsel for an indigent defendant if requested.

(b) Capital Cases. After the Supreme Court has affirmed aN INDIGENT capital defendant's conviction and sentence, the Supreme Court or its designee must appoint counsel who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. If the Supreme Court has authorized the presiding judge of the county where the case originated to appoint counsel, the presiding judge must file a copy of the appointment order with the Supreme Court. If a capital defendant files a successive notice, the presiding judge must appoint the defendant's previous post-conviction counsel, unless the defendant waives counsel or there is good cause to appoint another qualified attorney who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. On application and if the trial court finds that such assistance is reasonably necessary, it must appoint co-counsel.

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

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

Rule ~~3332~~.6. Duty of Counsel; Defendant's Pro Se Petition; Waiver of Attorney-Client Privilege.

(a) **Generally.** In a Rule ~~3332~~ proceeding, counsel must investigate the defendant's case for any colorable claims.

(b) **Discovery.** After the filing of a notice, the court for good cause 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.

[~~STAFF~~NOTE: The Task Force should consider either revising this ~~to raise~~by raising the required showing for pre-petition discovery or relocating the provision so discovery is allowed only after filing a petition.]

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

- (1) a summary of the facts and procedural history of the case;
- (2) the specific materials that counsel reviewed;
- (3) the date counsel provided the record to the defendant, and the contents of that record;
- (4) the date(s) counsel discussed the case with the defendant;
- (5) ~~(5)~~ the charges and allegations presented in the complaint, information, or indictment;

The notice must also include an avowal that counsel has reviewed and considered:

- (6) ~~(6)~~ any adverse pretrial rulings affecting the course of trial (e.g., motions to suppress, motions *in limine*, motions to quash, speedy trial motions);
- (7) any adverse rulings during trial on objections or motions (e.g., objections regarding the admission or exclusion of evidence, objections premised on prosecutorial or judicial misconduct, mistrial motions, motions for directed verdict);

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

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

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

~~(6)~~(11) any potential errors ~~related to the entry of the plea for for~~ which there were no objections, but which ~~might~~may rise to the level of fundamental error;

~~(7)~~(12) ~~(7)~~ any determination of the defendant's competency that was raised prior to sentencing;

~~(8)~~(13) ~~(8)~~ any objections raised at the time of sentencing;

~~(9)~~(14) ~~(9)~~ the court's determination of the classification and category of offenses for which the defendant was sentenced ~~under the plea agreement;~~

~~(10)~~(15) ~~(10)~~ the court's determination of pre-sentence incarceration credit;

(16)~~(11)~~ the sentence imposed by the court;

~~(11)~~(17) issues raised by appellate counsel; and

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

~~(12)~~(18) ~~A notice of no colorable claims must also include trial or incorporate Form ____, with citations to the pertinent portions of the record appellate~~ counsel.

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

(e) **Counsel's Duties after Filing a Notice under Section (c).** After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the ~~Rule 33~~post-conviction proceeding.

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

PROPOSED COMMENT TO RULE ~~3332~~.6(c)

Rule ~~3332~~.6(c) is intended to assist counsel in reviewing the record to ensure that substantial justice is done. Failure to complete Form , or to identify any issues listed in Rules ~~3332~~.6(c) does not constitute a *per se* deviation from prevailing professional norms ~~to the extent a pleading defendant possesses a right to effective post conviction counsel under Arizona law.~~ See *Strickland v. Washington*, 466 U.S. 668 (1984).

Rule ~~3332~~.7. Petition for Post-Conviction Relief

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

(1) ~~Defendant with Counsel.~~ Noncapital Cases.

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

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

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

(2) Capital Cases.

(A) Generally. In a capital case, the defendant must file a petition no later than 12 months after the first notice is filed.

(B) Filing Deadline for Any Successive Petition. On a successive notice in a capital case, the defendant must file the petition no later than 30 days after the notice is filed.

(C) Time Extensions. For good cause, the court may grant a capital defendant one 60-day extension in which to file a petition. For good cause and after considering the rights of the victim, the court may grant additional 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 thereafter until a petition is filed.

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

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

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

(2) Capital Cases. In capital cases, the petition must not exceed 80 pages.

(d) Declaration. A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief. The declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations.

(e) Attachments. The defendant must attach to the petition any affidavits,

records, or other evidence currently available to the defendant supporting the allegations in the petition.

- (f) **Effect of Non-Compliance.** The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition, so it complies 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 3332.8. Transcript Preparation.

(a) **Request 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.

(b) **Order Regarding Transcripts.** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant will raise in the petition.

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

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

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

Rule 3332.9. Response and Reply; Amendments

(a) **State's Response.**

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

and after considering the rights of the victim.

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

(b) **Defendant's Reply.** The defendant may file a reply 15 days after a response is served. The court for good cause may grant an extension of time.

(c) Length of Response and Reply.

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

- (4) *Capital Cases.* In capital cases, the State's response must not exceed 80 pages, and defendant's reply must not exceed 40 pages.

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

Rule 3332.10. Assignment of a Judge.

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

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

Rule 3332.11. Court Review of the Petition, Response, and Reply; Further Proceedings.

(a) **Summary Disposition.** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must

summarily dismiss the petition.

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

(c) Notice to Victim. If the court sets a hearing, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.

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

Rule 3332.12. Informal Conference

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

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

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

Rule 3332.13. Evidentiary Hearing

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

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

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

(d) Decision.

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

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

(A) the conviction, sentence, or detention;

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

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

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

Rule ~~33.16~~32.14. Motion for Rehearing.

(a) **Timing and Content.** No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.

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

(c) **Stay.** The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court. [Cross-reference Rule ~~33.16(h)~~32.18(i).]

(d) **Effect on Appellate Rights.** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule ~~34.11~~32.18.

(e) **Disposition if Motion Granted.** If the court grants the motion for rehearing, it

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

Rule 3332.15. Notification to the Appellate Court.

If an appeal of a defendant's conviction or sentence is pending, defendant's counsel, or if defendant is self-represented, the defendant, must file in the appellate court a notice of any relief granted by the trial court.

Rule 3332.16. Petition and Cross-Petition for Review.

(a) Time and Place for Filing.

- (1) *Petition.* No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (2) *Cross-Petition.* The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.
- (3) *Place for Filing.* The parties must file the petition for review, cross-petition, and all responsive filings with the appellate court and not the trial court.
- (4) *Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.*

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

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

before that date.

(b) Notice of Filing and Additional Record Designation. No later than 3 days after a petition or cross-petition for review is filed, the petitioner or cross-petitioner must file with the trial court a “notice of filing.” The notice of filing may designate additional items for the record described in section (h). These items may include additional certified transcripts of trial court proceedings prepared under Rule [33-832.10](#), or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition or cross-petition for review.

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

(1) Form and Length. Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

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

(A) copies of the trial court's rulings entered under Rules ~~33.11,~~ [3332.13](#), [32.15](#), and ~~33.14~~[32.16](#); [should this provision include a summary disposition of the notice?]

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

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

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

(3) Effect of a Motion for Rehearing. The filing of a motion for rehearing under Rule [33.1432.16](#) does not limit the issues a party may raise in a petition or cross-petition for review.

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

~~(e)~~(d) **Appendix Accompanying a Petition or Cross-Petition.** Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.

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

~~(e)~~(f) **Response to a Petition or Cross-Petition for Review; Reply**

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

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

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

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

(3) *Reply.* No later than 10 days after a response is served, a party may file a reply. The reply is limited to matters addressed in the response and may not exceed 3,000 words if typed and 11 pages if handwritten. It also must comply with the requirements in subpart (c)(21) and may not include an appendix.

~~(f)~~(g) **Computing and Modifying Appellate Court Deadlines.** Except as otherwise

provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in this rule. An appellate court may modify any deadline in accordance with Rule 31.3(e).

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

~~(h)~~**(i) Stay Pending Appellate Review.** The State's filing of a petition for review of an order granting a new trial automatically stays the order until appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting a stay pending further review is within the discretion of the trial court. [Cross-reference Rule ~~3332~~.14(c).]

~~(i)~~**(j) Transmitting the Record to the Appellate Court.** No later than 45 days after receiving a notice of filing under ~~section (b)(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.

~~(j)~~**(k) Disposition.** The appellate court may grant review of the petition and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper. [Lacey's suggested edits.]

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

~~(l)~~**(m) 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~~.

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

Rule ~~3332~~.17. Stay of Execution of a Death Sentence on a Successive Petition.

If a defendant has been sentenced to death and the Supreme Court has fixed the time for executing the sentence, the superior court may not grant a stay of execution if the defendant files a successive petition. In those circumstances, the defendant must file an application for a stay with the Supreme Court, and the

application must show with particularity any claims that are not precluded under Rule 32.2. If the Supreme Court grants a stay, the Supreme Court clerk must notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

Rule 32.18. 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 32.19. Extensions of Time; Victim Notice and Service ~~**[Question: does this rule apply only to capital cases? If so, it could be removed from Rule 33.]**~~

(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 ~~33.1832.20~~. 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 ~~3332~~.4(b)(4). The State must respond to the petition no later than 45 days after it is served.

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

(d) **Court Orders.**

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

- (A) a reasonable probability exists that the defendant would not have been prosecuted, or the defendant's verdict or sentence would have been more favorable if DNA testing would produce exculpatory evidence;
- (B) the evidence is still in existence; and
- (C) the evidence was not previously subjected to DNA testing, or the

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

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

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

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

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

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

(e) **Test Results.**

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

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

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

(g) **Unfavorable Test Results.** If the results of the post-conviction DNA testing are not favorable to the defendant, the court must dismiss without a

hearing any DNA-related claims asserted under Rule 32.1 ~~or Rule 33.1.~~
The court may make further orders as it deems appropriate, including orders:

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

(h) Favorable Test Results. Notwithstanding any other provision of law that would bar a hearing as untimely, the court must order a hearing and make any further orders that are required by statute or the Arizona Rules of Criminal Procedure if the results of the post-conviction DNA testing are favorable to the defendant. If there are no material issues of fact, the hearing need not be an evidentiary hearing, but the court must give the parties an opportunity to argue why the defendant should or should not be entitled to relief under Rule ~~33~~32.1 as a matter of law.

[Home Table of Contents](#)

Rule 32.1. Scope of Remedy
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.1

Rule 32.1. Scope of Remedy

Currentness

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 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 file a notice of post-conviction relief of-right or a notice of appeal within the required time was not the defendant's fault;
- (g) there has been a significant change in the law that, if applied to the defendant's case, would probably overturn the defendant's conviction or sentence; or
- (h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt, or that the death penalty would not have been imposed.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

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 26.11(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).

HISTORICAL AND STATUTORY NOTES

Former Rule 32.1, relating to scope of remedy, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.1, AZ ST RCRP Rule 32.1
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.2. Preclusion of Remedy
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.2

Rule 32.2. Preclusion of Remedy

Currentness

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

- (1) still raisable on direct appeal under Rule 31 or in a post-trial motion under Rule 24;
- (2) finally adjudicated on the merits in an appeal or in any previous collateral proceeding; or
- (3) waived at trial, on appeal, or in any previous collateral proceeding.

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

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.2, relating to preclusion of remedy, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.2, AZ ST RCRP Rule 32.2
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.3. Nature of a Post-Conviction Proceeding and Relation to Other Remedies
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.3

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

Currentness

(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.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

COMMENT

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

Rule 32 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. See A.R.S. §§ 13-4121 et seq. (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.

HISTORICAL AND STATUTORY NOTES

Former Rule 32.3, relating to nature of proceeding and relation to other remedies, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.3, AZ ST RCRP Rule 32.3
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.4. Filing of Notice and Petition, and Other Initial Proceedings
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.4

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

Currentness

(a) Notice of Post-Conviction Relief.

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

(2) *Time for Filing.*

(A) Generally. In filing a notice, a defendant must follow the deadlines set forth in this rule. These deadlines do not apply to claims under Rule 32.1(d) through (h).

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

(C) Time for Filing a Notice in an Of-Right Proceeding. In a Rule 32 of-right proceeding, a defendant must file the notice no later than 90 days after the entry of judgment and sentence. A defendant may raise an of-right claim of ineffective assistance of Rule 32 counsel in a successive Rule 32 notice if it is filed no later than 30 days after the final order or mandate in the defendant's of-right petition for post-conviction relief.

(D) Time for Filing a Notice in Other Noncapital Cases. In all other noncapital cases, a defendant must file a notice no later than 90 days after the entry of judgment and sentence or no later than 30 days after the issuance of the order and mandate in the direct appeal, whichever is later.

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

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

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

(B) Notice to an Appellate Court. If an appeal of the defendant's conviction or sentence is pending, the clerk must send a copy of the notice of post-conviction relief to the appropriate appellate court no later than 5 days of its filing, and must note in the record the date and manner of sending the copy.

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

(b) Appointment of Counsel.

(1) *Capital Cases.* After the Supreme Court has affirmed a capital defendant's conviction and sentence, it must appoint counsel who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041. Alternatively, the Supreme Court may authorize the presiding judge of the county where the case originated to appoint counsel. If the presiding judge makes an appointment, the court must file a copy of the appointment order with the Supreme Court. If a capital defendant files a successive notice, the presiding judge must appoint the

defendant's previous post-conviction counsel, unless the defendant waives counsel or there is good cause to appoint another qualified attorney who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041.

(2) *Noncapital Cases.* No later than 15 days after the filing of a notice of a defendant's timely or first Rule 32 proceeding, the presiding judge must appoint counsel for the defendant if: (A) the defendant requests it; and (B) the judge has previously determined that the defendant is indigent or the defendant has completed an affidavit of indigency. Upon the filing of all other notices in a noncapital case, the presiding judge may appoint counsel for an indigent defendant if requested.

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

(1) *Capital Cases.*

(A) *Filing Deadline for First Petition.* In a capital case, the defendant must file a petition no later than 12 months after the first notice is filed.

(B) *Filing Deadline for Any Successive Petition.* On a successive notice in a capital case, the defendant must file the petition no later than 30 days after the notice is filed.

(C) *Time Extensions.* For good cause, the court may grant a capital defendant one 60-day extension in which to file a petition. For good cause and after considering the rights of the victim, 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.

(e) Transcript Preparation.

(1) *Requests for Transcripts.* If the trial court proceedings were not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request.

(2) *Order.* The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant will raise in the petition.

(3) *Deadline.* Certified transcripts must be prepared and filed no later than 60 days after the entry of the order granting the request.

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

(5) *Extending the Deadline for Filing a Petition.* If a defendant requests the preparation of certified transcripts, the defendant's deadline for filing a petition under (c) is extended by the time between the request and either the transcripts' final preparation or the court's denial of the request.

(f) Assignment of a Judge. The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. If the sentencing judge's testimony will be relevant, the case must be reassigned to another judge.

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

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

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).

HISTORICAL AND STATUTORY NOTES

Former Rule 32.4, relating to commencement of proceedings, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.4, AZ ST RCRP Rule 32.4
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.5. Contents of a Petition for Post-Conviction Relief
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.5

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

Currentness

(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.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.5, relating to contents of petition, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.5, AZ ST RCRP Rule 32.5

Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.6. Response and Reply; Amendments; Review
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.6

Rule 32.6. Response and Reply; Amendments; Review

Currentness

(a) **State's Response.** The State must file its response no later than 45 days after the defendant files the petition. The court may grant the State a 30-day extension to file its response for good cause, and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim. The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations.

(b) **Defendant's Reply.** No later than 15 days after a response is served, the defendant may file a reply. The court may for good cause grant an extension of time.

(c) **Amending the Petition.** After the filing of a post-conviction relief petition, the court may permit amendments only for good cause.

(d) Review and Further Proceedings.

(1) *Summary Disposition.* If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.

(2) *Setting a Hearing.* If the court does not summarily dismiss the petition, it must set a status conference or hearing within 30 days on those claims that present a material issue of fact. The court also may set a hearing on those claims that present only a material issue of law.

(3) *Notice to Victim.* If a hearing is ordered, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.6, relating to additional pleadings, summary disposition, and amendments, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.6, AZ ST RCRP Rule 32.6
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.7. Informal Conference
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.7

Rule 32.7. Informal Conference

Currentness

- (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.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.7, relating to informal conference, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.7, AZ ST RCRP Rule 32.7
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.8. Evidentiary Hearing
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.8

Rule 32.8. Evidentiary Hearing

Currentness

(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.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.8, relating to evidentiary hearing, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.8, AZ ST RCRP Rule 32.8
Current with amendments received through 11/1/17

[Home Table of Contents](#)

Rule 32.9. Review
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.9

Rule 32.9. Review

Currentness

(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) 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).

(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 (e). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.4 (e), or that were otherwise available to the trial court and the parties, and are material to the issues raised in the petition for review.

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

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

(A) *Form and Length.* Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

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

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

- (ii) a statement of issues the trial court decided that the defendant is presenting for appellate review;
- (iii) a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and
- (iv) reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

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

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

(5) Appendix Accompanying Petition or Cross-Petition.

(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.

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

(d) Stay Pending Review. The State's filing of a motion for rehearing or a petition for review of an order granting a new trial 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) Transmitting the Record to the Appellate Court.

(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.

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

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

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.9, relating to review, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.9, AZ ST RCRP Rule 32.9
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.10. Review of an Intellectual Disability Determination in Capital Cases
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.10

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

Currentness

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.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.10, relating to review of intellectual disability determination, was abrogated effective Jan. 1, 2018. See, now, this rule.

Former Rule 32.10, was deleted effective Dec. 1, 1992, nunc pro tunc effective Sept. 30, 1992.

16A A. R. S. Rules Crim. Proc., Rule 32.10, AZ ST RCRP Rule 32.10
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.11. Extensions of Time; Victim Notice and Service
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.11

Rule 32.11. Extensions of Time; Victim Notice and Service

Currentness

(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.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.11, relating to extension of time and notification of victims, was abrogated effective Jan. 1, 2018. See, now, this rule.

16A A. R. S. Rules Crim. Proc., Rule 32.11, AZ ST RCRP Rule 32.11
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

[Home Table of Contents](#)

Rule 32.12. Post-Conviction Deoxyribonucleic Acid Testing
Arizona Revised Statutes Annotated
Rules of Criminal Procedure

Arizona Revised Statutes Annotated
Rules of Criminal Procedure (Refs & Annos)
IV. Pretrial Procedures
Rule 32. Post-Conviction Relief (Refs & Annos)

16A A.R.S. Rules Crim.Proc., Rule 32.12

Rule 32.12. Post-Conviction Deoxyribonucleic Acid Testing

Currentness

(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.

Credits

Added by Aug. 31, 2017, effective Jan. 1, 2018.

<Promulgated August 31, 2017>

<Effective January 1, 2018>

Editors' Notes

HISTORICAL AND STATUTORY NOTES

Former Rule 32.12, relating to post-conviction deoxyribonucleic acid testing, was abrogated effective Jan. 1, 2018.

16A A. R. S. Rules Crim. Proc., Rule 32.12, AZ ST RCRP Rule 32.12
Current with amendments received through 11/1/17

END OF DOCUMENT

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

Hon. Joseph Welty, Chair
Task Force on Rule 32, Ariz. R. Crim. P., Petitioner
1501 W. Washington St.
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE 32,) Supreme Court No. R-19-_____
TO ADOPT A NEW RULE 33, AND)
TO RENUMBER CURRENT)
RULE 33, ARIZONA RULES OF)
CRIMINAL PROCEDURE)
)
_____)

Petitioner is the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure, which is submitting this petition through its undersigned chair. Petitioner requests this Court to amend Rule 32 and to adopt a new Rule 33, as shown in the appendix and for the reasons provided in this petition. New Rule 33 would displace current Rule 33 (“criminal contempt”), and Petitioner accordingly requests the renumbering of current Rule 33 as Rule 35, which is presently “reserved.”

1. **Background.** A previous Supreme Court Task Force, the Task Force on the Arizona Rules of Criminal Procedure, undertook a global restyling of the Criminal Rules, including Rule 32. (See Rule Petition No. R-17-0002.) That Task Force recognized the need for substantive revisions to Rule 32. However, because

Draft for the 12.04.2018 Task Force meeting

the primary objective of that Task Force was restyling, it refrained from making other than minor substantive changes to Rule 32. Instead, the Task Force recommended that the Court establish another committee for that purpose.

On January 24, 2018, the Court entered Administrative Order No. 2018-07, which established the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure (hereinafter “Task Force”), the present petitioner. The Order directed the Task Force to “identify possible substantive changes that improve upon the objectives of Rule 32 and the post-conviction relief process.”

Task Force membership includes judges from the Court of Appeals in Divisions One and Two; judges of the Superior Court of Arizona in Maricopa, Mohave, and Pima Counties; a municipal court judge; an equal number of prosecutors and defense counsel, including representatives of the Office of the Arizona Attorney General and the Federal Public Defender’s Office; a victims’ rights representative; and a professor from the Rogers College of Law. Task Force staff included the chief staff attorney of Division Two, and a specialist from the Court Services Division of the Administrative Office of the Courts (“AOC”).

The Task Force met five times in 2018, usually in full day sessions. Several guests attended Task Force meetings. Three workgroups were established to review assigned issues, and these workgroups collectively had ten meetings. Small informal

meetings were devoted to revising the Task Force work product and drafting new Rule 33.

At the first Task Force meeting, a member from the Pima County Public Defender's Office and the Division Two chief staff attorney presented memorandum that identified 18 issues that required further discussion. (A list of these items is in Appendix #.) Other issues were subsequently noted. Some of these issues overlapped. Some issues were resolved relatively easily. Other issues were complex and required extensive legal research and extended discussions. All the issues were ultimately addressed. However, three issues deserve special mention at the outset.

2. Proposed Rule 33. At their first meeting, members discussed how the term "of-right" petition, which initially appears in the second paragraph of Rule 32.1, is something that many stakeholders find unclear and confusing. Members considered alternative nomenclature but found no better substitute for this term. They also discussed separating of-right provisions into their own separate sections of Rule 32 but realized that this might confound self-represented litigants who are seeking a clear explanation for the of-right process. Furthermore, of-right spawns the need to distinguish pleading defendants and non-pleading defendants, which is another confusing subset of terminology, especially for self-represented defendants.

Ultimately, the Task Force decided to locate all the provisions concerning post-conviction relief for defendants who entered a guilty or no-contest plea, or who

admitted a probation violation, into a new Rule 33. Defendants in these situations will have a single rule, customized to their procedural circumstances, to guide them through the process. Rule 33 is entirely self-contained. Defendants availing themselves of Rule 33 will no longer need to refer to Rule 32 and sort out the provisions that apply to their cases. It no longer includes references to of-right or pleading defendants. By the same token, Rule 32 is self-contained for defendants who seek post-conviction relief after a trial or a probation violation hearing. These non-pleading defendants will no longer need to sift through of-right provisions that have no application to their situations.

One drawback of the split Rule 32/Rule 33 solution is that these two rules duplicate many provisions and will slightly increase the length of the Criminal Rules. The Task Force considered splitting into separate Rules 32 and 33 only the provisions that are different, and then having a third rule that contained provisions common to both non-pleading and pleading defendants. However, that would defeat the advantage of having truly self-contained rules. Another drawback is that future amendments to one rule might need to be made to the other. And counsel who rely on a court opinion interpreting one rule might need to point to a parallel provision in the companion rule that applies in their case. Finally, the collateral reorganization and renumbering of rule subparts because of the split might make legal research more of a challenge. However, the consensus of the Task Force is the years to come,

self-represented litigants, judges, and practitioners should benefit from the increased clarity and focus of self-contained rules.

3. **Rule 32.1(b) and (c), and the matter of preclusion.** Current Rule 32.1(b) provides as a ground for relief that “the court did not have jurisdiction to render a judgment or to impose a sentence on the defendant.” The ground for relief under Rule 32.1(c) is that “the sentence imposed exceeds the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law.” Under Rule 32.2, a defendant is precluded from relief under Rule 32.1(b) or (c) for claims that were not timely raised, or that could have been raised in a previous petition or proceeding.

The Task Force concluded that the term jurisdiction in Rule 32.1(b) was most likely intended to refer only to subject matter jurisdiction. The distinction between types of jurisdiction is significant because while personal jurisdiction can be waived, subject matter jurisdiction cannot be waived. Although defendants rarely raise true claims of lack of subject matter jurisdiction, the Task Force believed as a matter of policy that those claims should not be precluded, consistently with the principle that subject matter jurisdiction can be raised at any time. See [State v Espinoza](#) and [State v. Maldonado](#).

Members also discussed the troublesome circumstance of a defendant whose sentence exceeds what the trial court intended to impose or what was permitted by

law, but who did not become aware of the discrepancy until the approach of an anticipated release date. Although this defendant might file a Rule 32 petition when becoming aware of the discrepancy, the petition might be dismissed on grounds of preclusion or untimeliness, leaving the defendant with no remedy. [Diaz](#), [Goldin](#), and [Gonzales](#) are examples of these cases.

Accordingly, the Task Force proposes a change to Rule 32.2(b) (“exceptions”) so that claims under Rule 32.1(b) and (c) would not be subject to preclusion. They believe that the number of meritorious claims under these sections is relatively small; and if a court did not have subject matter jurisdiction, or if a sentence is truly illegal, the interests of victims and the finality of judgments are not furthered by precluding those claims. Proposed Rule 32.2(b) would further provide that a claim that falls within an exception to preclusion “must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why defendant did not raise the claim in a previous notice or petition, the court may summarily dismiss the notice.”

4. **Rule 32.1(h)**. Rule 32.1(h) affords relief upon “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.” *State v. Miles*, 243 Ariz.

511 (April 10, 2018), considered the application of Rule 32.1(h) in a death penalty post-conviction proceeding. Although the disposition of the case did not rest on this rule provision, the case presented this issue: “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 the Task Force initially addressed a separation of powers issue. Members concurred that the adoption of Rule 32.1(h) was within the Court’s prerogative and noted that in the two decades since its adoption, the Legislature has not sought to annul the rule. Beyond that, members had divergent views on addressing the footnote in *Miles*.

One view: One view, supported by prosecutors, 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

penalty phase verdicts from the purview of section (h). These members believe that the current rule's standard—that the fact-finder would not have imposed the death penalty—is vague and subjective and requires the PCR judge to get inside the mind of the original jury or judge, which is an impossible task. Members holding this view believed 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 under Rule 32.1(a).

Another view: Another view, which was supported by defense counsel, observed that the Arizona Supreme Court had three opportunities to consider the appropriateness of the provision at issue: first in the original rule petition, R-97-0006; then in a subsequent rule petition filed by the Arizona Attorney General, R-01-0015; and a third time in *Miles*. On each occasion, the Court either supported the rule or retained its substance.

Members holding this view further noted that Rule 32.1(h) has a high standard that is difficult to meet, and that on only a handful of occasions have capital defendants sought relief under this provision. These members therefore did not anticipate a flood of new petitions seeking relief under that provision because of *Miles*. These members also believed that the prosecutors' proposed revisions did not just clarify the rule, as *Miles* requested, but substantively changed it, which they

thought was unnecessary. If there was to be any revision, they would prefer one that clarified whether the standard for relief under Rule 32.1(h) is objective or subjective.

A third view: At the November Task Force meeting, a member introduced another proposed revision to Rule 32.1(h). The intent of this version was only to address the issue presented in *Miles* by clarifying that the standard was an objective one. The proposed revision was as follows:

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

Following further discussion, members formally voted on whether to include in their proposed Rule 32 the amendments proposed by the prosecutors, or those proposed at the November meeting. Seven members favored the newly proposed modification, six favored the prosecutors' revisions, and there was one abstention. Accordingly, the version shown directly above is included in the proposed amendments to Rule 32.

5. Other issues. Although Rule 32 was recently restyled, Task Force made further changes to grammar and syntax to improve the rule's clarity and increase its readability. Although the Task Force did not add new comments, they revised the current comments. The following substantive and stylistic changes are particularly noteworthy. (References below are to the proposed rules.)

- A. Rules 32.4(b)(3)(A) and 33.2(b)(3)(A):** [State v. Whitman, 234 Ariz. 565 \(2014\)](#) clarified that the time for filing a notice of appeal ran from the oral pronouncement of sentence, rather than from when the judgment of sentence was filed, and Rule 31.2(a) was amended accordingly. The Task Force proposes similar amendments to make the provisions of Rules 32 and 33 consistent with Rule 31 and with *Whitman*.
- B. Rule 32.5(d) and 33.5(c):** Proposed amendments to these rules clarify that upon the filing of a notice, the defendant's prior counsel must share files and other communications with PCR counsel, and that this sharing of information does not waive attorney-client privilege or confidentiality claims.
- C. Rule 32.5(b):** The proposed amendment would require the automatic assignment of two attorneys to a capital post-conviction proceeding. This amendment codifies current practices in Maricopa County.
- D. Rules 32.6(b) and 33.6(b):** These proposed amendments would supersede *Canion v. Cole*, 210 Ariz. 598 (2005) by allowing, for good cause, discovery after the filing of a PCR notice but before the filing of a post-conviction petition.
- E. Rules 32.6(c) and 33.6(c):** After discussing [State v. Chavez, 243 Ariz. 313 \(App. 2017\)](#), members decided to establish a list of rule requirements

that counsel must address when filing a Notice of No Colorable Claims.

The lists in Rule 32 and Rule 33 are different, depending on whether the defendant entered a plea or proceeded to trial.

F. Rule 32.6(f) and 33.6(f): Members added these rule provisions to provide that when a defendant raises a claim of ineffective assistance of counsel in a PCR noted, 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).”

G. Rules 32.10(a) and 33.10(a): These provisions would extend to PCR proceedings the rights to a change of judge provided by Rules 10.1 and 10.2 whenever the PCR proceeding is assigned to a new judge.

H. Rules 32.10(b) and 33.10(b): The court hears disputes regarding public records requests by special action. These amendments would allow the judge assigned to a PCR proceeding to hear and decide the records dispute, whether raised by special action or by motion, if it concerns access to public records requested for the PCR proceeding.

I. Rules 32.11(d) and 33.11(d): [*Fitzgerald v. Myers*, 243 Ariz. 84, \(2017\)](#) held “that neither A.R.S. § 13-4041 nor Rule 32.5 requires a trial court to determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition.” However, the Court added that a

trial court may order a competency evaluation “if it is helpful or necessary for a defendant’s presentation of, or the court’s ruling on, certain Rule 32 claims....” These amendments would codify that holding by allowing the trial court to “order a competency evaluation if the defendant’s competence is necessary for a presentation of the claim.”

J. Rules 32.14 and 32.16/33.14 and 33.16: Current Rule 32.9 is titled “review.” Current Rule 32.9(a) and (b) pertain to a motion for rehearing in the trial court. Current Rule 32.9(c) through (i) concern a petition for review in an appellate court. The proposed rules bifurcate these proceedings into separate rules. The proposed rules are also internally reorganized for better readability.

K. Rules 32.15 and 33.15: Criminal Rule 31.3(b) permits suspension of an appeal to allow the trial court to decide a Rule 24 or 32 issue. That provision also requires an appellant to notify the appellate court when the trial court has decided the issue. This new rule clarifies that when there are concurrent proceedings in the trial and appellate courts, notice to the appellate court is required when the trial court grants Rule 32 relief, but not when relief is denied; and that defense counsel or a self-represented defendant has the duty of providing the notice.

L. Rules 32.16(a)(4) and 33.16(a)(4): These rules clarify the process for requesting extensions of time for appellate filings in the Rule 32 proceeding.

M. Rules 32.20 and 32.18: These rules eliminate the distinction between mandatory testing and discretionary testing of DNA because the Task Force did not find this distinction to be meaningful.

6. Conclusion. Petitioner requests that the Court open this petition for comment as provided by Supreme Court Rule 28. Petitioner will review public comments and file a reply as permitted by Rule 28.

RESPECTFULLY SUBMITTED this __ day of January 2019.

By _____
Hon. Joseph Welty, Chair

Appendix #

The initial list of issues included the following subjects:

Preclusion

Discovery

Diaz and *Goldin* issues

Privilege and confidentiality waivers

Subject matter jurisdiction

Illegal sentences and preclusion

Anders-type review

Mata issues

Notice to appellate court on suspension

Content of notice

Time limit for filing notice and petition

Whitman issue

Competence

Rule 32.1 redrafting “of right” language

Extensions to file a petition for review

Rule 32.4(c) expansion of extension time frames

Notice of change of judge in a PCR proceeding (Rule 10.2)

Mandate the assignment of two lawyers in capital PCRs (Rule 6.8)

Notes of significant changes.

Rule 32.1: Scope of Remedy

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

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

"Of right" language has been removed.

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

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

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

The comments were modestly restyled.

Rule 32.2: Preclusion of Remedy

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

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

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

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

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

Rule 32.4: Filing a Notice Requesting Post-Conviction Relief

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

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

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

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

Rule 32.5: Appointment of Counsel

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

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

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

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

Rules 32 and 33: Staff's notes of changes

12.04.2018

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

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

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

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

Rule 32.7: Petition for Post-Conviction Relief

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

- Rule 32.7(a), “deadlines for filing a petition for post-conviction relief,” were taken from Rule 32.4(c), “time for filing a petition for post-conviction relief,” of the August 31 version. But because there are more non-capital cases than capital cases, the non-capital deadline now appears first.
- Rule 32.7(b), “form of petition,” 32.7(c), “length of petition,” 32.7(d), “declaration,” 32.7(e), “attachments,” and 32.7(f), “effect of non-compliance,” were taken from Rule 32.5 of the previous version.

Rule 32.8: Transcript Preparation

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

Rule 32.9: Response and Reply; Amendments

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

Rule 32.10: Assignment of a Judge

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

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

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

Rule 32.12: Informal Conference

This provision tracks Rule 32.7 of the previous version.

Rule 32.13: Evidentiary Hearing

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

Rule 32.14: Motion for Rehearing

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

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

Rule 32.15: Notification to the Appellate Court

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

Rule 32.16: Petition and Cross-Petition for Review

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

Rule 32.17: Stay of Execution of a Death Sentence on a Successive Petition

Rule 32.18: Review of an Intellectual Disability Determination in Capital Cases

Rule 32.19: Extensions of Time; Victim Notice and Service

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

Rule 32.20: Post-Conviction Deoxyribonucleic Acid Testing

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

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

Rule 33: Rule 33 differs from Rule 32 as noted below.

Rule 33.1: Scope of Remedy.

The “generally” provision is modified to clarify that this rule applies to a defendant who entered a plea of guilty or no contest, admitted a probation violation, or had an automatic probation violation based on a plea of guilty.

The second sentence of “generally” advises that a defendant may file a second PCR notice to challenge the effectiveness of counsel in the first PCR proceeding.

In the grounds for relief, section (a) was modified to refer to the defendant’s plea or admission to a probation violation.

Section (d) is currently different, but this should be revised so it is identical.

Section (e) is different considering the variation in the scope of Rules 32 and 33.

Section (f) was modified to refer to a notice of PCR rather than a notice of appeal.

Section (g) refers to sentence, but unlike Rule 32, it does not refer to conviction.

Section (h) does not include text applicable in death penalty proceedings.

Rule 33.2: Preclusion of Remedy.

The grounds of preclusion specified in section (a) were modified to apply to pleading defendants only. But the exceptions to preclusion in section (b) should be identical in Rules 32 and 33.

Rule 33: Nature of Post-Conviction Proceeding and Relation to Other Remedies.

Section (b) was modified to apply to pleading defendants.

Section (c) of Rule 32 applies to defendants sentenced to death, and this section was omitted from Rule 33.

Rule 33: Filing a Notice Requesting Post-Conviction Relief.

Section (b) omits language in Rule 32.4(b) regarding the issuance of a mandate. Rule 33 omits a subpart in Rule 32.4(b) concerning capital cases, but it adds a subpart about a successive notice for claims of Rule 33 IAC.

Rules 32 and 33: Staff's notes of changes
12.04.2018

Rule 32.5: Appointment of Counsel

Rule 33 omits a provision in Rule 32.5 about the appointment of counsel in capital cases.

Rule 33.6: Duty of Counsel, etc.

The notice of no colorable claim in Rule 33 has a different list of items than Rule 32.

Rule 33.7: Petition for Post-Conviction Relief

Rule 33 omits provisions pertinent only to capital cases.

Rule 33.12: Informal Conference

Rule 33 omits a section relevant only to capital cases.

Rule 33 omits Rule 32.17: Stay of Execution of a Death Sentence on a Successive Petition and Rule 32.18: Review of an Intellectual Disability Determination in a Capital Case.