

Rule 32 Task Force

Meeting Agenda

Friday, May 10, 2019

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

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

Item no. 1	Call to Order Introductory remarks	<i>Hon. Joseph Welty, Chair</i>
Item no. 2	Approval of the March 22, 2019 meeting minutes	<i>Judge Welty</i>
Item no. 3	Discussion of proposed forms	<i>All</i>
Item no. 5	Discussion of the APAAC, State Bar, staff, and other comments	<i>All</i>
Item no. 7	Discussion of a reply to the comments	<i>All</i>
Item no. 8	Motions and roadmap	<i>Judge Welty</i>
Item no. 9	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 Angela Pennington at (602) 452-3547. Please make requests as early as possible to allow time to arrange accommodations.

**Rule 32 Task Force
State Courts Building, Phoenix
Meeting Minutes: March 22, 2019**

Members attending: Hon. Joseph Welty (Chair), Timothy Agan, Hon. James Beene, Hon. Cathleen Brown Nichols, Hon. Kent Cattani, Hon. Peter Eckerstrom, David Euchner, Jennifer Garcia (by telephone), Hon. Kellie Johnson, Jason Kreag by his proxy Carlos Carrion, Dan Levey, Michael Mitchell, Hon. Samuel Myers, David Rodriguez by his proxy Geri Roll, Hon. James Sampanes, Mikel Steinfeld, Lacey Stover Gard (by telephone), Hon. Danielle Viola, Hon. Rick Williams [all members present in person, by telephone, or by a proxy]

Guests: John Todd, Colleen Clase, Kathryn Andrews, Tim Geiger (by telephone)

Task Force Staff: Beth Beckmann, Mark Meltzer, Angela Pennington, Susan Pickard, Theresa Barrett

1. **Call to order; introductory remarks; approval of meeting minutes.** The Chair called the sixth Task Force meeting to order at 12:35 p.m. The Chair noted that the Task Force's rule petition R-19-0012 was filed on January 10, 2019. The petition included changes the Chair made on the members' behalf and in furtherance of their discussion at the December 4, 2018 meeting. After filing, staff provided a link to the rule petition, and invited comment from, the State Bar committee and section on criminal law, several prosecution and defender agencies, and a private criminal defense attorney, but none of them filed comments during the first comment period. In February, the Chair presented the rule petition to two Supreme Court standing committees, the Committee on Superior Court and the Committee on Limited Jurisdiction Courts. Each of these committees thereafter filed a comment on the Rules Forum supporting the rule petition. The Chair also briefed the Chief Justice and the AOC's Administrative Director on the petition's proposed changes.

The Chair asked members to review the December 4, 2018 meeting minutes. There were no corrections and a member made the following motion:

Motion: To approve the December 4, 2018 minutes. The motion received a second and it passed unanimously. **R32TF: 007**

The Chair then advised that today, members would consider staff's notes and proposed changes to the rules, items on the Rules Forum, and new drafts of post-conviction forms.

2. **Staff's notes concerning Rules 32 and 33.** Staff annotated Rules 32 and 33, as filed in January, with several concerns and suggested changes. Members reviewed these notes, beginning with the notes in Rule 32. (This agenda item did not include a discussion of every rule provision, but only those noted below.)

Rule 32: Staff proposed adding the words "or a contested probation violation hearing" to the title of Rule 32. Members agreed with that change.

Rule 32.1 (“scope of remedy/grounds for relief”): Staff expressed concern about whether Rules 32.1(c) and (d) were sufficiently differentiated. Members again noted that the phrase in current Rule 32.1(c), that the sentence exceeds the maximum, is encompassed within another phrase that a sentence is not authorized by law, so the phrase about exceeding the maximum was appropriately deleted. To further clarify section (c), members deleted the words “by the judge or as computed by the Arizona Department of Corrections.” The words “by the judge” were previously added to section (c) only in juxtaposition to the ADOC, which has now also been deleted. Section (c) now simply says, “the sentence as imposed is not authorized by law.” A defendant held after the sentence expired, or who will be held after the sentence expires, would encompass circumstances in which ADOC has miscalculated the release date, so section (d) is accurate without additional modifications. With the changes described in this paragraph, the comment to Rule 32.1(d) now makes sense and members made no further changes.

Rule 32.2 (“preclusion of remedy”): Staff’s note suggested that the proposed language in Rule 32.2(b) [“claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion...”] is inaccurate because it does not subject (b) through (h) claims to the effect of preclusion if, for example, a (b) through (h) claim was previously adjudicated on appeal. Members generally agreed that section (b) required modification. One member proposed adding “(3)” to the first sentence of Rule 32.2(b) so it would read, “claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3).” Staff suggested adding the words, “but are subject to preclusion under Rules 32.2(a)(1) and (2),” but members thought the carve-out of (a)(3) was sufficient without this additional language. Members felt that with this modification, it would be clear that claims under (b) through (h) would be subject to preclusion under Rule 32.2(a)(2) (previously adjudicated on the merits). But a claim that falls under (b) through (h) will not be waived by the defendant’s failure to raise it at trial, on appeal, or in a prior post-conviction proceeding. The only change to Rule 32.2, therefore, was adding “(3)” to section (b).

Rule 32.3 (“nature of a post-conviction proceeding and relation to other remedies”): Staff asked whether the rule or a comment to the rule should provide guidance when a defendant pleads guilty to an offense but proceeds to trial on an aggravator, i.e., would that be a Rule 32 or a Rule 33 proceeding? This situation arises under current Rule 32, and case law has already addressed it, so that case law should be sufficient guidance under the proposed rules, too. Moreover, this issue would most likely occur in a capital case, and under the proposed rules, Rule 32 would expressly and exclusively apply. Members agreed that no change was necessary.

Rule 32.4 (“filing a notice requesting post-conviction relief”): A comment to the proposed rule advised that an appeal may be suspended pending the trial court’s resolution of a post-conviction proceeding, but it doesn’t address the converse, i.e., suspending the PCR in the trial court pending disposition of the appeal. Members concurred that the rule does not need to address this; the court inherently has authority to do this, or it can dismiss the post-conviction proceeding without prejudice pending the outcome of the appeal.

Rule 32.5 (“appointment of counsel”): Staff noted that the formatting of Rules 32.5(a) and 33.5(a) varied. Members agreed that they should be identical, and Rule 33.5(a) was reformatted

accordingly. In addition, a sentence that appeared only in Rule 33.5(a) ["Upon filing of all other Rule 32 notices, the presiding judge may appoint counsel for an indigent defendant"] was added to Rule 32.5(a). Members discussed whether "may" was appropriate in the foregoing provision, or whether it should be "must." Judges noted that self-represented litigants in successive proceedings customarily request the appointment of counsel, even when an appointment is not warranted. They pointed out that judges have the discretion to appoint counsel under those circumstances, and do make those appointments, just as they may appoint counsel when it is appropriate and the defendant has not requested it. Members concluded that "may" was correct. During a discussion of forms later in the meeting, the word "affidavit" of indigency in these rules was changed to "declaration" of indigency." In Rule 32.5(c) ("appointment of investigators, etc.") members declined to change "reasonably necessary" to "reasonable and necessary," and noted that "reasonably necessary" is the term utilized in current Rule 6.7(a) ("appointment of investigators, etc."). Members agreed to delete the words "at county expense" from Rule 32.5(c) because the cross-reference in this rule to Rule 6.7 is sufficient, and neither rule requires any further enumeration of the specific county accounts from which the expense will be paid.

Rule 32.6 ("duty of counsel, etc.): Proposed Rule 32.6(b), which concerns discovery, has two subparts, one for discovery after the defendant has filed a notice but before a petition is filed, and the other for discovery after the petition is filed. Staff noted that the second subpart contains a "materiality" requirement, but the first subpart does not, and staff proposed adding it. Members concluded that the "substantial need" requirement in the first subpart impliedly requires materiality, and they made no revisions to that subpart. The title of Rule 32.6(d) is "defendant's pro se petition." Members agreed to change this to "self-represented defendant's petition." Staff modified the comment to Rule 32.6(c) by deleting references to a "no colorable claims" checklist. While Rule 33.6 includes such a checklist, Rule 32.6 does not. Members thought this omission was appropriate because a non-pleading defendant has usually had an appeal and possibly an *Anders* review. Also, that checklist is more useful for post-conviction proceedings involving pleading defendants and to avoid a blanket avowal by counsel that "I reviewed everything" without further specification.

Rule 32.7 ("petition for post-conviction relief"): Members made two changes to section (d) ("declaration"). First, they changed "knowledge and belief" to "knowledge or belief." They also deleted the second sentence of the proposed rule ("The declaration must identify facts that are within the defendant's personal knowledge separately from other factual allegations"). Although defendants occasionally attach a separate sheet identifying facts within their knowledge, members concluded that there is little value in this specification and judges usually do not reject a petition that lacks one. Form 25, which is the number of the current form of the petition for post-conviction relief and also the revised form, are already congruent with this modification because these forms do not include this specification in the defendant's declaration. Staff also inquired whether Rule 32.7(f) ("effect of non-compliance") included within its ambit a failure to comply with Rule 32.7 concerning attachments. Members agreed that it did and that no further clarification of this point in the rule was necessary.

Rule 32.8 (“transcript preparation”): Staff suggested changing “the trial court proceedings” in section (a) to “the verbal record of trial court proceedings,” and members concurred.

Rule 32.14 (“motion for rehearing”): In section (e) (“disposition if motion granted”), staff asked if it was necessary for the court to “state its reasons” if it reaffirmed its previous ruling. Members agreed that it was not, and accordingly, the words “in either case” were deleted from the second sentence of that section.

Rule 32.15 (“notification to the appellate court”): Members rephrased this one sentence rule to make it more clear and concise but without changing its substance. As rephrased, the rule says, “If an appeal of a defendant’s conviction or sentence is pending, the defendant’s counsel or the defendant, if self-represented, must file any final rulings in the appellate court within 10 days after the ruling is filed.”

Rule 32.16 (“petition and cross-petition for review”): Members agreed with staff’s calculation in section (c): at 280 words per page (see Rule 1.6(b)(1)(E)), a handwritten brief that is the equivalent of 12,000 typed words should be 44 pages, not 50, and the number was accordingly corrected. Members also agreed with staff’s editing changes in section (j) (“transmitting the record to the appellate court”) by adding the words “to the appellate court” in the first sentence, and changing “responsive pleadings” to “responses;” and to a change in section (m) (“return of the record”) which changed “after the petition for review is resolved” to “after the disposition of the petition for review.”

Rule 32.17 (“post-conviction DNA testing”): Members saw no need to expand on the meaning of “State” because existing case law on discovery would be applicable. They also saw no need to add a reference to indigency for the payment of lab costs because that is a factor the court would consider as a matter of course. Members revisited their previous revisions, which combined the current mandatory and discretionary testing provisions of the current rule into a single provision, and they concurred that this was appropriate. In the last sentence of section (f) (“preservation of evidence”), members removed the words “including criminal contempt for a knowing violation;” the truncated provision simply concludes, “...the court may impose appropriate sanctions.” In section (g), which concerns unfavorable test results, members declined to add references to other databases in deference to those who are more familiar with suitable database designations, although they considered changing subpart (d)(2) to say, “an appropriate database.” Section (g) requires that a victim be given notification of an unfavorable test result, but a member suggested that section (h) concerning test results favorable to the defendant should contain a similar requirement. After discussion, members added a new last sentence to section (h): “If requested, a victim must be given notice of the hearing.”

Rule 32.20 (“extensions of time in a capital case; victim notice and service”): Staff suggested that subparts (b)(1) and (b)(2) conflict because if the victim has not specified the manner of service, one subpart requires service by regular mail and the other requires service through the prosecutor’s office. Members did not consider these provisions to be conflicting, but in subpart (b)(1), the changed “method” of service to “manner” of service.

Rule 33: Members discussed the following provisions.

Rule 33.1 (“scope of remedy/grounds for relief”): Members discussed three sections of this rule. (1) Rules 33.1(c) and (d) should mirror the revisions the Task Force made today to the corresponding provisions of Rule 32, with the exception that Rule 33.1(c) will continue to include the words “or by the plea agreement.” (2) Rule 33.1(f) provides, “the failure to timely file a notice of post-conviction relief was not the defendant’s fault.” Because Rule 33.4(b)(3) has no time limitation on (b) through (h) claims, should Rule 33.1(f) apply only to claims under Rule 33.1(a)? Members agreed that Rule 33.1(f) has application to (a) claims only, but they declined to make a change to the text. (3) Does Rule 33.1(h) have relevance in the context of a pleading defendant, who waives non-jurisdictional defects and defenses to a criminal charge when entering a plea? Members agreed that it did. They recognized that a pleading defendant’s decision is often tied to the risk of trial rather than to whether a defendant is actually innocent, and a pleading defendant who is actually innocent should have an avenue for relief. One member gave an example of a pleading defendant who is later exonerated by a DNA test (although another member characterized that as a claim of newly discovered evidence.) Members agreed that Rule 33.1(h) is an extraordinary remedy for rare cases, and they made no changes to the proposed rule.

Rule 33.2 (“preclusion of remedy”): Members made a change to Rule 33.1(b) like the change to Rule 32.2(b), i.e., adding (a)(3). A member also noted a concern with the comment. A defendant at the time of entering a plea does not waive defects or defenses to the subsequent sentence. Members agreed and added the words “or to the sentence” at the end of the first sentence of the comment to Rule 33.2(a)(1).

Rule 33.5 (“appointment of counsel”); Rule 33.6 (“duty of counsel, etc.”); Rule 33.7 (“petition for post-conviction relief”); Rule 33.14 (“motion for rehearing”); Rule 33.15 (“notification to the appellate court”); Rule 33.16 (“petition and cross-petition for review”); and Rule 33.17 (“post-conviction DNA testing”): Members made changes, or declined to make changes, to these rules corresponding to their previous discussion of Rule 32, with certain notes as follows. In Rule 33.14, the rule is correct as written, i.e., the court can grant a pleading defendant a “new trial,” even though there was not a previous trial. In Rule 33.15, “send” will be changed to “file” in this rule and in Rule 32.15. Rule 33.16(a)(4) and Rule 32.16(a)(4) should be uniform, and each of these provisions should have two subparts. Rules 33.17 and 32.17 should be identical.

3. Rules Forum comments. Three substantive comments were filed on the Court Rules Forum, and members discussed each comment.

Ms. Mehu’s comment: After reviewing the comment, members considered whether to add to the rules a list of constitutional right that might be the subject of relief. Members concluded that there was nothing to add to the rules, or to remove, in response to this comment.

Ms. Maroko’s (Aderant’s) comment: In response to the first portion of the comment regarding Rules 32.6(d) and 33.6(d), staff recommended changing “may” to “must” [now, “...the court may allow the defendant to file a petition on his or her own behalf.”] Members disagreed with staff’s recommendation and made no change. Regarding Rule 32.7(f) and 33.7(f) and

notwithstanding the comment's suggestion, members retained the phrase "return the petition," and noted that Rule 1.7(b)(4) has a specific provision for the effective date of documents filed by an incarcerated defendant. Members disagreed with the observation in this comment that the terms "notice" and "petition" lacked specificity and thought the comment might have originated by comparing these rules with jurisdictions that do not utilize a notice of post-conviction relief. The Chair directed staff to correct the scrivener's errors noted in the last section of this comment.

Mr. Volkmer's comment: The Chair noted that the first section of the comment, concerning Rules 32.1(c) and 33.1(c), had been addressed by modifications members had made to those rules earlier in the meeting. Ms. Roll, a deputy Pinal County Attorney who was present as proxy for Mr. Rodriquez, facilitated a discussion of the other portions of the comment filed by Mr. Volkmer, the Pinal County Attorney. She opposed Rules 32.4(b)(3)(D) and 33.4(b)(3)(D) that require the court to excuse an untimely notice if the defendant provides an adequate explanation; she believes this should be discretionary. She also opposed Rule 32.5(a) and 33.5(a) regarding the appointment of investigators and mitigation specialists, because she did not believe the current rule required this expansion. The Chair asked members if they wanted to reconsider their previous discussions and decisions concerning these provisions, but none answered affirmatively. Similarly, the Task Force's response to the portion of this comment concerning the discovery rules (Rules 32.6(b) and 33.6(b)), was that this subject had been extensively discussed at prior meetings, and Mr. Volkmer's comment did not persuade members to reconsider their views on these rules. Ms. Roll characterized the issue of the defendant's post-conviction competence (Rules 32.11(d) and 33.11(d)) as a very complex issue, distinguished it from issues of defendant's pre-trial competence, and contended that it was difficult to capture the nuances of this post-conviction issue in a single sentence, as the proposed rules do. She believed that the proposed rule lacks standards and it is therefore difficult for experts to address the issue in the same manner that they do pretrial. If the Task Force retains the provision, she suggested substituting the word "mental status" - which she believes is more flexible - for the word "competence." But members noted that "competence" was the word used in the *Fitzgerald* opinion and that this issue had been discussed at length during previous meetings. Members declined to make changes to this provision.

4. Other rule petitions. Two other petitions were filed during the current rules cycle that requested changes to Rule 32, and those were considered during the meeting.

Rule petition R-19-0008 was filed by the Maricopa County Attorney and seeks to modify various rules relating to juror privacy. (A similar but not identical petition was previously filed by that office, R-14-0008, which the Court denied.) The proposed amendment to Rule 32.1 would add a process for the court to permit contact with a juror who had previously refused post-verdict contact. Because the provision did not directly impact the process for post-conviction relief, and the Task Force took no position on the proposal.

Rule petition R-19-0016 was filed by the Arizona Voice for Crime Victims. Like a previous petition filed by the AVCV (R-18-0001), the petition seeks to abrogate Rule 39 and integrate victims' rights throughout the criminal rules. Ms. Clase offered remarks on behalf of the AVCV and advised the members that the recent petition sought to address stakeholder concerns with

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the earlier proposal. The Chair noted that the Criminal Rules Task Force petition, R-17-0002, had previously added victim notification provisions in Rule 32 to emphasize victims' interest in the finality of the post-conviction process, and members agreed that the additional changes to Rule 32 proposed in R-19-0016 were unnecessary.

5. Forms. Members then discussed six forms that were in the meeting materials. The materials included a staff memo that detailed the modifications to these forms and explained the reasons for these changes.

Form 24(b) is the Notice Requesting Post-Conviction Relief. A member asked to remove the notary requirement in this form following the affidavit of indigency at the bottom of the third page. because it is difficult to obtain a notary while confined. Also, Civil Rule 80(c) permits a declaration under oath in lieu of a notarized affidavit in most circumstances, and this form should dispense with the notary requirement and permit a declaration. Members agreed to this change, and to change the word "affidavit" in Rules 32.5(a) and 33.5(a) to "declaration." Members discussed adding either the word "optional" or a checkbox before the request for an attorney but they declined to do so because self-represented defendants will almost always complete this section regardless of those cues, and the court will appoint an attorney when one is warranted.

Form 25(b) is the Checklist for No Colorable Claims. At a member's suggestion, the Task Force agreed to add four items to the checklist:

- the plea agreement contains the correct classification of offenses and the correct sentencing range of each offense
- any aggravating factors are supported by the record
- the court considered any mitigation that was offered
- if a sentence above the presumptive term was imposed, the court relied on at least one proven statutory aggravating factor

Members further agreed to add these items to the list of factors in the text of Rule 33.6(c)

Given the lateness of the hour, members offered no comments concerning Form 23(a) (notice of rights after sentencing in the superior court (non-capital)); Form 23(b) (notice of rights after sentencing in a capital case); Form 25 (petition for post-conviction relief) and Form 26 (defendant's request for the court's record). The Chair will determine whether to include forms in the amended rule petition. He asked members to carefully review the forms before the May 10 Task Force meeting.

6. Roadmap. The Chair noted that he and staff would draft and file an amended petition and would make appropriate corrections in the revised rules and appendices, including grammatical and syntactical edits. He asked members for their authority to do so. Members unanimously agreed that he had that authority.

The Task Force will file its amended petition by April 5, and the amended petition and revised rules will be opened for a second round of comments. The second comment period closes on May 1. The next Task Force meeting is set for Friday, May 10, 2019, beginning at 10 a.m.

7. **Call to the public; adjourn.** There was no response to a call to the public. The meeting adjourned at 5:03 p.m.

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-19-0012
TO ADOPT A NEW RULE 33;)
TO AMEND VARIOUS RULE 41) Amended Petition
FORMS AND TO ADOPT NEW)
FORMS; TO RENUMBER)
RULE 33, ARIZONA RULES OF)
CRIMINAL PROCEDURE; AND)
TO ADOPT A CONFORMING)
CHANGE TO RULE 17.1(e),)
ARIZONA RULES OF CRIMINAL)
PROCEDURE)
_____)

Petitioner, the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure (“Task Force”), is submitting this amended petition as provided by the Court’s January 15, 2019 Order authorizing a modified comment period. The amended petition includes four appendices, each of which is designated with a number followed by “AP” (“amended petition”).

Appendix 1-AP shows a conforming change to Criminal Rule 17.1(e), which was described in Part 6 of the January 2019 petition but was not reproduced in an

appendix. However, rather than merely showing the technical change to this rule noted in the January petition (i.e., changing Rule 32 to Rule 33), Appendix 1-AP is a restyled, superseding version of Rule 17.1(e).

Appendix 2-AP shows redline changes to the version of Rule 32 that Petitioner filed with the January rule petition, and Appendix 3-AP does the same for Rule 33. The changes in Appendices 1-AP, 2-AP, and 3-AP have been highlighted in yellow to make them easier to locate.

Appendix 4-AP contains six proposed forms regarding post-conviction relief.

The Task Force met on March 22, 2019. The meeting included a discussion of comments received during the first comment period, and that discussion is summarized in Part 1 of this amended petition. Parts 2 and 3 of this amended petition discuss changes to Rules 32 and 33 proposed on the Task Force's initiative and not prompted by stakeholder comments. Part 4 includes a discussion of new and revised forms concerning post-conviction relief.

1. Rules Forum Comments. In addition to the distribution of the petition provided in Supreme Court Rule 28(d), staff provided a link to the rule petition and invited comments from the State Bar committee and section on criminal law, several prosecution and defender agencies, and a private criminal defense attorney, but none of these groups or individuals filed comments during the first comment period. In February, the Task Force Chair presented the rule petition to two Supreme Court

standing committees, the Committee on Superior Court and the Committee on Limited Jurisdiction Courts. Each of these committees thereafter filed a comment on the Rules Forum supporting the rule petition. Three substantive comments were filed by attorneys on the Court Rules Forum, and Task Force members discussed each comment at their March 22 meeting.

After reviewing the comment by Katia Mehu, members considered whether to add to the proposed rules a list of constitutional right that might be the subject of relief. Members concluded that there was nothing to add to the rules, or to remove, in response to this comment.

Members discussed a series of comments filed by attorney Linda Moroko on behalf of Aderant (Aderant is a California-based company that provides legal services support and management solutions.) In response to the first portion of the comment regarding Rules 32.6(d) and 33.6(d), members considered changing “may” to “must” [the January version says, “...the court may allow the defendant to file a petition on his or her own behalf”] but thereafter made no change. Regarding Rule 32.7(f) and 33.7(f) and notwithstanding the comment’s suggestion, members retained the phrase “return the petition,” and noted that Rule 1.7(b)(4) has a specific provision for the effective date of documents filed by an incarcerated defendant. Members disagreed with the observation in this comment that the terms “notice” and “petition” lacked specificity and thought the comment might have originated by

comparing these rules with jurisdictions that do not utilize a notice of post-conviction relief. The Chair directed staff to correct the scrivener's errors noted in the last section of this comment.

Finally, members considered the comment filed by Kent P. Volkmer, the Pinal County Attorney. A member of that office was present during the March 22 Task Force meeting and provided additional input concerning that comment. The first section of the comment, concerning Rules 32.1(c) and 33.1(c), was addressed by modifications members made to those rules earlier in the meeting. See the discussion at pages 5-6, *infra*. The deputy Pinal County Attorney who was present at the meeting opposed Rules 32.4(b)(3)(D) and 33.4(b)(3)(D), which require the court to excuse an untimely notice if the defendant provides an adequate explanation; the Pinal County Attorney believes this should be discretionary. The Pinal County Attorney also opposed Rules 32.5(a) and 33.5(a) regarding the appointment of investigators and mitigation specialists and contended that the current rule does not require this expansion. Members declined to reconsider their previous discussions and decisions concerning these provisions. Similarly, regarding the portion of this comment concerning the discovery rules (Rules 32.6(b) and 33.6(b)), Task Force members agreed that post-conviction discovery had been extensively discussed at prior meetings, and Mr. Volkmer's comment did not persuade them to reconsider their views on this subject.

The Pinal County Deputy Attorney characterized the issue of the defendant’s post-conviction competence (Rules 32.11(d) and 33.11(d)) as a very complex issue, distinguished it from issues of defendant’s pretrial competence, and contended that it was difficult to capture the nuances of this issue in the context of post-conviction proceedings in a single sentence, as the proposed rules do. The deputy believed that the proposed rule lacks standards and it would therefore be difficult for experts to address the issue in the same manner as experts in pretrial proceedings. If the Task Force retains the provision, the deputy suggested substituting the word “mental status” – which the deputy believes is more flexible – for the word “competence.” But members noted that they had discussed Fitzgerald [[Fitzgerald v. Myers](#), 243 Ariz. 84 (2017)] at length during their prior meetings, and that “competence” was the word used in that opinion. Accordingly, they declined to make changes to the wording of this provision.

2. Changes to Rule 32 on the Task Force’s initiative. Task Force members carefully reviewed their January work product and concluded that several changes were warranted. The proposed changes noted below are those agreed to by the members. Members considered other changes at the March 22 meeting that they rejected. A few of the rejected items are noted below; all the rejected changes are documented in the draft minutes of that meeting.

Rule 32.1 (“scope of remedy/grounds for relief”): Members had concerns whether Rules 32.1(c) and (d) were sufficiently differentiated. To further clarify section (c), members deleted the words “by the judge or as computed by the Arizona Department of Corrections.” The words “by the judge” were previously added to section (c) only in juxtaposition to the “Department of Corrections,” which has been deleted. Section (c) now simply says, “the sentence as imposed is not authorized by law.” A defendant held after the sentence expired or who will be held after the sentence expires would encompass situations in which ADOC has miscalculated the release date, so section (d) is accurate without additional modifications. With the changes described in this paragraph, the comment to Rule 32.1(d) now makes sense and members made no further changes.

Rule 32.2 (“preclusion of remedy”): The proposed language in the January version of Rule 32.2(b) [“claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion...”] is inaccurate because it does not subject (b) through (h) claims to the effect of preclusion if, for example, a (b) through (h) claim was previously adjudicated on appeal. To correct this, members agreed to add “(3)” to the first sentence of Rule 32.2(b) so it reads, “claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3).” With this modification, (b) through (h) claims would be subject to preclusion under Rule 32.2(a)(1) (i.e., still raiseable on appeal or in a post-trial motion) and under Rule

32.2(a)(2) (previously adjudicated on the merits). But (b) through (h) claims are not waived by the defendant's failure to previously raise the claim at trial, on appeal, or in a prior post-conviction proceeding.

Rule 32.5 (“appointment of counsel”): The formatting of Rules 32.5(a) and 33.5(a) varied, and members agreed that they should be identical. Rule 33.5(a) was reformatted accordingly. In addition, a sentence that appeared only in Rule 33.5(a) [“Upon filing of all other Rule 32 notices, the presiding judge may appoint counsel for an indigent defendant”] was added to Rule 32.5(a). Members discussed whether “may” was appropriate in the foregoing provision, or whether it should be “must.” Judges noted that self-represented litigants in successive proceedings customarily request the appointment of counsel, even when an appointment is not warranted. The judges noted further that they have the discretion to appoint counsel in those instances and do make those appointments if it is appropriate, even when the defendant has not requested it. Members accordingly concluded that “may” was correct. During a discussion of forms later in the meeting, the word “affidavit” of indigency in these rules was changed to “declaration” of indigency. Members agreed to delete the words “at county expense” from Rule 32.5(c) because the cross-reference in this rule to Rule 6.7 is sufficient, and neither rule requires further enumeration of the specific county accounts from which the expense will be paid.

Rule 32.6 (“duty of counsel, etc.”): In proposed Rule 32.6(b), members concluded that the “substantial need” requirement in the first subpart impliedly requires materiality, and they made no revisions to that subpart. The title of Rule 32.6(d) is “defendant’s pro se petition.” Members agreed to change this to “self-represented defendant’s petition.” Staff modified the comment to Rule 32.6(c) by deleting references to a “no colorable claims” checklist. Although Rule 33.6 includes such a checklist, Rule 32.6 does not. Members thought this modification was appropriate because a non-pleading defendant has usually had an appeal and possibly an *Anders* review. [*Anders v. California*, 386 U.S. 738 (1967).] Also, that checklist is more useful for post-conviction proceedings involving pleading defendants and to avoid a blanket avowal by counsel that “I reviewed everything” without further specification.

Rule 32.7 (“petition for post-conviction relief”): Members made two changes to section (d) (“declaration”). First, they changed “knowledge and belief” to “knowledge or belief.” They also deleted the second sentence of the proposed rule (“The declaration must identify facts that are within the defendant’s personal knowledge separately from other factual allegations.”) Although defendants occasionally attach a separate sheet identifying facts within their knowledge, members concluded that there is little value in this specification and judges usually do not reject a petition that lacks one. Form 25, which is the number of

the current form of the petition for post-conviction relief, as well as the revised Form 25, are congruent with this modification because neither of these forms includes this specification in the defendant's declaration.

Rule 32.8 (“transcript preparation”): Members agreed to change “the trial court proceedings” in section (a) to “the verbal record of trial court proceedings.”

Rule 32.14 (“motion for rehearing”): In section (e) (“disposition if motion granted”), members discussed whether it was necessary for the court to “state its reasons” if it reaffirmed its previous ruling. They agreed that it was not and accordingly, the words “in either case” were deleted from the second sentence of that section.

Rule 32.15 (“notification to the appellate court”): Members rephrased this single sentence rule to make it more clear and concise but without changing its substance. They also changed the word “send” to “file.” As rephrased, the rule says, “If an appeal of a defendant’s conviction or sentence is pending, the defendant’s counsel or the defendant, if self-represented, must file any final rulings in the appellate court within 10 days after the ruling is filed.”

Rule 32.16 (“petition and cross-petition for review”): Members recalculated a page limit in section (c): at 280 words per page (see Rule 1.6(b)(1)(E)), a handwritten brief that is the equivalent of 12,000 typed words should be 44 pages, not 50, and the number in Rule 32.16(c) was accordingly corrected. Members also

agreed in section (j) (“transmitting the record to the appellate court”) to add the words “to the appellate court” in the first sentence; in section (j) to change “responsive pleadings” to “responses” in the second sentence; and in section (m) (“return of the record”) to change “after the petition for review is resolved” to “after the disposition of the petition for review.”

Rule 32.17 (“post-conviction DNA testing”): Members revisited their previous revisions, which combined the mandatory and discretionary testing provisions of the current rule into a single provision, and they concurred that this was appropriate. In the last sentence of section (f) (“preservation of evidence”), members removed the words “including criminal contempt for a knowing violation;” the truncated provision simply concludes, “...the court may impose appropriate sanctions.” Section (g) requires that a victim be given notification of an unfavorable test result, but some members thought that section (h) concerning test results favorable to the defendant should contain a similar requirement. After discussion, members added a new last sentence to section (h): “If requested, a victim must be given notice of the hearing.”

Rule 32.20 (“extensions of time in a capital case; victim notice and service”): In subpart (b)(1), members changed “method” of service to “manner” of service.

3. Changes to Rule 33 on the Task Force's initiative.

Rule 33.1 (“scope of remedy/grounds for relief”): Members added the words “or no contest” to the title of the rule. Members agreed that Rule 33.1(c) and (d) should mirror the revisions the Task Force made today to the corresponding provisions of Rule 32, with the exception that Rule 33.1(c) will continue to include the words “or by the plea agreement.” Rule 33.1(f) provides, “the failure to timely file a notice of post-conviction relief was not the defendant’s fault.” Because Rule 33.4(b)(3) has no time limitation on (b) through (h) claims, the Task Force discussed whether Rule 33.1(f) should apply only to claims under Rule 33.1(a). Members agreed that Rule 33.1(f) only applies to (a) claims, but they declined to make a change to the text of this provision.

The detailed analysis of Rule 33.1(h) [at page 4 of Appendix 4 to the January petition] previously noted a potential need to modify this provision. Members therefore discussed whether Rule 33.1(h) had relevance in the context of a pleading defendant, who waives non-jurisdictional defects and defenses to a criminal charge when entering a plea. They agreed that it did. They recognized that a pleading defendant’s decision to enter a plea is often tied to the risk of trial rather than to actual innocence, and a pleading defendant who is actually innocent should have an avenue for relief. One member gave an example of a pleading defendant who is later exonerated by a DNA test (although another member characterized that as a claim

of newly discovered evidence.) Members agreed that Rule 33.1(h) is an extraordinary remedy for rare cases, and they made no changes to the proposed rule.

Rule 33.2 (“preclusion of remedy”): In Rule 33.2(a)(1), after the words “pleading guilty,” members added the words “or no contest.” Members made a change to Rule 33.1(b) like the change to Rule 32.2(b), i.e., adding (a)(3). Members also noted a concern with the comment. At the time a defendant enters a plea, he or she is not waiving defects or challenges to the subsequent sentence. Accordingly, the Task Force added the words “or to the sentence” at the end of the first sentence of the comment to Rule 33.2(a)(1).

Rule 33.5 (“appointment of counsel”); Rule 33.6 (“duty of counsel, etc.”); Rule 33.7 (“petition for post-conviction relief”); Rule 33.14 (“motion for rehearing”); Rule 33.15 (“notification to the appellate court”); Rule 33.16 (“petition and cross-petition for review”); and Rule 33.17 (“post-conviction DNA testing”): Members made or declined to make changes to these rules corresponding to their previous discussion of Rule 32. Members also agreed to propose an amendment to Rule 33.6(c), as shown under the discussion of Form 25(b), the Checklist for No Colorable Claims, *infra*.

4. Post-Conviction Forms. Members discussed six forms at their March 22 meeting. Five of the forms contain modifications to current forms. One of the forms, the no colorable claims checklist, is new. Staff prepared a memo dated March 22,

2019, which detailed the modifications and explained the reasons for these changes. The memo is included with the forms in Appendix 4-AP.

Members had no changes to four of the draft forms: *Form 23(a)* (notice of rights after sentencing in the superior court (non-capital)); *Form 23(b)* (notice of rights after sentencing in a capital case); *Form 25* (petition for post-conviction relief) and *Form 26* (defendant's request for the court's record). However, they made changes to two forms.

Form 24(b) is the Notice Requesting Post-Conviction Relief. Members agreed to remove the notary requirement in this form, which appeared after the affidavit of indigency at the bottom of the third page, because it is difficult for an inmate to obtain a notary while confined. Moreover, Civil Rule 80(c) permits a declaration under oath in lieu of a notarized affidavit in most circumstances, and this form should dispense with the notary requirement and permit a declaration. Because of this modification, members agreed to change the word "affidavit" in Rules 32.5(a) and 33.5(a) to "declaration." Members discussed adding either the word "optional" or a checkbox before the request for an attorney but they declined to do so because self-represented defendants will almost always complete this section regardless of those cues, and the court will appoint an attorney when one is warranted.

Form 25(b) is a Checklist for No Colorable Claims for use by counsel for a pleading defendant. Members agreed to add four items to the draft checklist:

- the plea agreement contains the correct classification of offenses and the correct sentencing range of each offense
- any aggravating factors are supported by the record
- the court considered any mitigation evidence that was offered
- if a sentence above the presumptive term was imposed, the court relied on at least one proven statutory aggravating factor

Members further agreed to add these items to the list of factors in the text of Rule 33.6(c).

5. Conclusion. The Task Force has set a meeting on May 10, 2019, to consider the second round of comments. Petitioner will then file a reply with any additional proposed changes, as provided by the Court's January 15, 2019 Order.

RESPECTFULLY SUBMITTED this 5th day of April 2019.

By _____
Hon. Joseph Welty, Chair

For the complete set of comments posted on the Rules Forum in R-19-0012 – click here	
Number + Source + Date	Summary
<p>1. APAAC 04.15.2019</p>	<p>The Arizona Prosecuting Attorneys’ Advisory Council (“APAAC”) comment concerned four items.</p> <p><u>First</u>, proposed Rule 32.1(h) allows defendants to present new mitigation evidence to allege actual innocence of the death penalty, contradicting <i>Sawyer v. Whitley</i>, 505 U.S. 333, 345 (1992) (holding that actual innocence of the death penalty means that the defendant can prove factual innocence of the aggravating factors or other conditions of eligibility, but not additional mitigation). APAAC recommends that the Rule be amended to permit relief only if a defendant proves that he would not have been found eligible for the death penalty:</p> <p style="padding-left: 40px;">...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 <u>of the offense</u> beyond a reasonable doubt, or that <u>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</u> the death penalty would not have been imposed.</p> <p><u>Second</u>, although the Task Force’s petition takes steps to avoid piecemeal litigation by limiting the application of Rules 32.2(b) and 33.2(b), those Rules should require a showing of <i>good cause</i> to prevent unnecessary successive petitions. A good cause requirement does not foreclose relief for defendants in exceptional cases where there may be valid reasons for raising claims in a successive PCR petition, but it enforces Rule 32’s goal to “prevent endless or nearly endless reviews of the same case in the same trial court. [Citation omitted.]”</p> <p>APAAC recommends the following amendment to the April 5, 2009, Task Force Proposal for Rule 32.2(b):</p> <p style="padding-left: 40px;">Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3). However, when a defendant raises a claim that falls under Rule 32.1(b) through</p>

(h) in a successive ~~or untimely~~ post-conviction notice, the defendant must ~~explain the reasons~~ establish good cause 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~~ show good cause why the defendant did not raise the claim in a previous notice or petition, ~~or in a timely manner~~, the court may summarily dismiss the notice. . . .

And APAAC recommends the same amendment to the April 5, 2019 Task Force Proposal for Rule 33.2(b):

Claims for relief based on Rule 33.1(b) through (h) are not subject to preclusion under Rule 33.2(a)(3). However, when a defendant raises a claim that falls under Rule 32.1(b) through (h) in a successive ~~or untimely~~ post-conviction notice, the defendant must ~~explain the reasons~~ establish good cause 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~~ show good cause why the defendant did not raise the claim in a previous notice or petition, ~~or in a timely manner~~, the court may summarily dismiss the notice. . . .

The above amendments also remove references to untimely PCR petitions. These provisions are no longer necessary because the Task Force’s proposed Rules 32.4(b)(3) and 33.4(b)(3) require that defendants file notices for claims under Rules 32.1(b) through (h) and Rules 33.1(b) through (h) “within a reasonable time after discovering the basis for the claim,” making the timeliness of the petition a separate inquiry.

Third, the Task Force’s petition creates a new right to prepetition discovery. That right could unnecessarily burden the State with discovery requests for claims that may never come to fruition. APAAC opposes Rules 32.6(b)(1) and 33.6(b)(1). Discovery in PCR proceedings is intentionally limited because “the State is entitled to a presumption that [defendants’] convictions [are] regularly obtained and are valid.” *Canion*, 210 Ariz. at 600, ¶ 13. It is incumbent on defendants to raise claims that undermine that presumption before demanding discovery from the State. Until the defendant presents a colorable claim, it is unduly burdensome for the State to litigate discovery requests posed by defendants in PCR proceedings.

Fourth, the Task Force’s petition may inadvertently require the appointment of defense counsel for successive petitions that raise claims not subject to preclusion. If so, the Task Force’s petition would expand defendants’ rights

to appointed counsel.

Post-conviction claims that are not subject to preclusion were previously exempted from the time limits in Rule 32.4. *See* Ariz. R. Crim. P. 32.4(a)(2)(A). Under the Task Force’s proposal, a defendant who files claims under Rules 32.1(b) through (h), or 33.1(b) through (h), must file a notice “within a reasonable time after discovering the basis of the claim.” Proposed Rules 32.4(b)(3)(B) & 33.4(b)(3)(B). To the extent these claims are now considered “timely,” the Task Force’s proposed Rules 32.5(a) and 33.3(5) could inadvertently require the appointment of counsel in many successive PCR proceedings. Rules 32.5(a) and 33.5(a) should be clarified to prevent this unanticipated consequence. First, Rule 32.5(a) should be amended to read:

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

- (1) the defendant requests ~~it~~ counsel;
- (2) the defendant is entitled to appointed counsel under Rule 6.1(b); and
- (3) there has been a previous determination that the defendant is indigent, or the defendant has completed ~~an~~ a affidavit declaration of indigency and the court finds that the defendant is indigent.

Upon filing of all other Rule 32 notices, the presiding judge or the judge’s designee may appoint counsel for an indigent defendant.

Second, Rule 33.5(a) should be amended to read:

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

- (1) the defendant requests ~~it~~ counsel;
- (2) the defendant is entitled to an appointed counsel

	<p>under Rule 6.1(b); and</p> <p>(3) there has been a previous determination that the defendant is indigent, or the defendant has completed an a declaration affidavit of indigency and the court finds that the defendant is indigent.</p> <p>Upon filing of all other Rule 33 notices, the presiding judge <u>or the judge's designee</u> may appoint counsel for an indigent defendant if requested.</p> <p>Removing references to “timely” filed petitions from Rules 32.5(a) and 33.5(a) will ensure that defendants receive appointed counsel consistent with the application of current Rule 32.4.</p>
<p>2. State Bar 05.01.2019</p>	<p>Proposed Rule 32.6(c) subsections (6)-(11) are redundant in light of proposed subsection (18) that requires post-conviction counsel to list any potential claims of ineffective assistance of trial or appellate counsel. Additionally, since the cases under the new Rule 32 will not be of-right petitions for post-conviction relief, but will involve non-pleading defendants, the vast majority of the cases will proceed subsequent to a direct appeal and will involve ineffective assistance of counsel claims.</p> <p>Further, the proposed comment to 32.6(c) states:</p> <p>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 [sic] 32.6(c) does not constitute a <i>per se</i> deviation from prevailing professional norms. <i>See, Strickland v. Washington</i>, 466 U.S. 668 (1984).</p> <p>Petition at Appendix 2. [STAFF NOTE: The second sentence in the above quote was not include in the version of Rule 32 that the Task Force filed with its amended petition.]</p> <p>There is inconsistency between the directive of proposed Rule 32.6(c), mandating inclusion of a plethora of information regarding legal issues in a Notice of No Colorable Claim, and a comment that implies that failure to follow the dictates of the proposed rule is not a deviation from</p>

	<p>prevailing professional norms. If the intent of the 18 enumerated subsections is actually to aid post-conviction counsel in “reviewing the record to ensure that substantial justice is done,” as opposed to detailing counsel’s work for the Court, it might be more efficacious to include the enumerated subsections in the comment and identify them as a standard for post-conviction counsel.</p> <p>Regardless of whether the 18 subsections are intended to aid counsel or the court, with so much information mandated for disclosure, it may well be appropriate to add to the comment a directive that counsel must take care not to reveal client confidences to the court in the Notice without the client’s informed consent. (<i>See</i>, Ariz. Rules Sup. Ct. 42, ER 1.6).</p>
<p>3. Staff 05.01.2019</p>	<p>Staff proposed several redline changes to the version of Rule 32 that was filed with the amended petition and added a few comments. These changes and comments are shown in blue highlight to distinguish them from the yellow highlights in the amended petition version. The version of Rule 33 that’s included in the meeting materials does not have these notes and comments, but most of what is shown in Rule 32 would apply equally to Rule 33.</p> <p>One staff comment raised the possibility of a conflict between Rule 32.2 and Rule 32.16 (see the underlined text):</p> <p style="text-align: center;">Rule 32.2. Preclusion of Remedy</p> <p>(a) Preclusion. A defendant is precluded from relief under Rule 32.1(a) based on any ground:</p> <ol style="list-style-type: none">(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) <u>waived at trial or on appeal, or in any previous post-conviction proceeding</u>, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant. <p>(b) Claims Not Precluded. Claims for relief based on Rule 32.1(b) through (h) are <u>not subject to preclusion under Rule 32.2(a)(3)</u>.</p> <p style="text-align: center;">Rule 32.16. Petition and Cross-Petition for Review</p> <p>(c) Form and Contents of a Petition or Cross-Petition for Review.</p>

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	<p>(4) Waiver. A party's failure to raise any issue that could be raised in the petition or cross-petition for review <u>constitutes a waiver</u> of appellate review of that issue.</p>
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9
10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**
12

13 In the Matter of:

Supreme Court No. R-19-0012

14 **PETITION TO AMEND RULE 32;**
15 **TO ADOPT A NEW RULE 33;**
16 **TO AMEND VARIOUS RULE 41**
17 **FORMS AND TO ADOPT NEW**
18 **FORMS; TO RENUMBER**
19 **RULE 33, ARIZONA RULES OF**
20 **CRIMINAL PROCEDURE; AND**
21 **TO ADOPT A CONFORMING**
22 **CHANGE TO RULE 17.1(e),**
23 **ARIZONA RULES OF CRIMINAL**
24 **PROCEDURE**

COMMENT OF
THE ARIZONA PROSECUTING
ATTORNEYS' ADVISORY
COUNCIL

25 **I. BACKGROUND OF PETITION**

In 2017, the Criminal Rules Task Force, which proposed a global restyling of the Arizona Rules of Criminal Procedure (Supreme Court No. R-17-0002), recommended that a separate task force be created to examine substantive changes to Rule 32, Arizona Rules of Criminal Procedure. As a result, The Task Force on Rule 32 of the Arizona Rules of Criminal Procedure (hereafter "Task Force") was created, chaired by the Hon. Joseph Welty. On January 10, 2019 the Task Force

1 filed an initial petition which proposed amendments to current Rule 32 and adoption
2 of a new Rule 33. An amended petition was filed on April 5, 2019. The intent of
3 the Task Force proposal is to differentiate post-conviction relief for criminal
4 defendants who were sentenced following a trial or contested probation violation
5 hearing from those who pled guilty/no contest or admitted a probation violation.
6

7 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has
8 considered the proposed changes in the amended petition¹ and has four main areas
9 for comment. First, proposed Rule 32.1(h) allows defendants to present new
10 mitigation evidence to allege actual innocence of the death penalty, contradicting
11 *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (holding that actual innocence of the
12 death penalty means that the defendant can prove factual innocence of the
13 aggravating factors or other conditions of eligibility, but not additional mitigation).
14 Second, although the Task Force's petition takes steps to avoid piecemeal litigation
15 by limiting the application of Rules 32.2(b) and 33.2(b), those Rules should require
16 a showing of *good cause* to prevent unnecessary successive petitions. Third, the
17 Task Force's petition creates a new right to prepetition discovery. That right could
18 unnecessarily burden the State with discovery requests for claims that may never
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22

23
24 ¹ During a shortened initial comment period, APAAC had insufficient time to hold
25 a committee meeting and present any proposed draft comment to the APAAC
Council for approval.

1 come to fruition. Fourth, the Task Force’s petition may inadvertently require the
2 appointment of defense counsel for successive petitions that raise claims not subject
3 to preclusion. If so, the Task Force’s petition would expand defendants’ rights to
4 appointed counsel. Each of these claims are discussed in detail herein.

6 **II. DISCUSSION/ANALYSIS**

7 **A. Rule 32.1(h) – The Proposed Rule Expands Relief for Claims Based**
8 **on Actual Innocence in Capital Cases from Aggravating Factors to**
9 **New Mitigation Evidence.**

10 Rule 32.1(h) currently permits relief when “the defendant demonstrates by
11 clear and convincing evidence that the facts underlying the claim would be sufficient
12 to establish that no reasonable fact-finder would find the defendant guilty beyond a
13 reasonable doubt, or that the death penalty would not have been imposed.” The Rule
14 has been applied by one superior court judge to permit relief based on newly-
15 proffered mitigation. *See State v. Miles*, 243 Ariz. 511, 513-14, 8-10 (2018)
16 (declining to resolve whether superior court had correctly interpreted Rule 32.1(h)
17 as permitting relief based only on newly developed mitigation evidence). This
18 interpretation poses a significant threat to finality in capital cases.

21 The Rule 32 Task Force adopted the following amendment to Rule 32.1(h):

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

1
2 Without question, the Task Force’s amendment improves the Rule by making clear
3 that it states an objective standard and that a judge may not set aside a death sentence
4 merely because, in his or her subjective view, the mitigation outweighs the
5 aggravation. The Task Force’s amendment also is consistent with the Arizona
6 Supreme Court’s recent observation that the current Rule should be interpreted to
7 require an objective standard. *See Miles*, 243 Ariz. at 514, ¶ 11 (“The better reading
8 is that Rule 32.1(h)’s reference to ‘the court’ means a reasonable sentencer, whether
9 a judge or jury.”); *Id.* at 518, ¶¶ 30–32 & n.6 (2018) (Pelander, V.C.J., concurring)
10 (noting Rule’s subjectivity as written and opining, “In my view, Rule 32.1(h) is a
11 prime candidate for the [Rule 32] Task Force’s consideration.”). However, the Task
12 Force’s amendment does not resolve the question whether a defendant may carry his
13 burden under the Rule based solely on newly-proffered mitigation—a question that
14 will continue to be litigated. And to the extent the Rule permits a defendant to show
15 his “death-penalty innocence” based on new mitigation evidence, it endangers
16 finality, which is a critical interest Rule 32 specifically safeguards. *See State v.*
17 *Shrum*, 220 Ariz. 115, 118, ¶ 12 (2009) (preclusion rules “prevent endless or nearly
18 endless reviews of the same case in the same trial court”) (quoting *Stewart v. Smith*,
19 202 Ariz. 446, 450, ¶ 11 (2002)). To rectify this concern, APAAC recommends that
20 the Rule be amended to permit relief only if a defendant proves that he would not
21
22
23
24
25

1 have been found eligible for the death penalty:

2 the defendant demonstrates by clear and convincing evidence that the
3 facts underlying the claim would be sufficient to establish that no
4 reasonable fact-finder would find the defendant guilty of the offense
5 beyond a reasonable doubt, or that no reasonable fact-finder would find
6 the defendant eligible for the death penalty in an aggravation phase held
7 pursuant to A.R.S. § 13-752 the death penalty would not have been
8 imposed.

9 **B. Rules 32.2(b) and 33.2(b) – To Limit Successive Petitions, Rules**
10 **32.2(b) and 33.2(b) Should Require a Showing of “Good Cause”.**

11 Rule 32.2(a) currently states that a defendant “shall be precluded from relief
12 under this rule based upon any ground”:

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

19 Existing Rule 32.2(b), however, excludes claims raised under Rule 32.1(d)
20 through (h) from the above preclusion provisions. The Task Force’s proposed
21 amendment expands Rules 32.2(b) and 33.2(b) to exempt from preclusion claims
22 under Rules 32.1(b) and (c), and 33.1(b) and (c). To prevent defendants from
23 attempting to relitigate claims that are not subject to preclusion, the Task Force’s
24 April 5, 2019, proposal would limit Rules 32.2(b) and 33.2(b) to exempt only claims
25 precluded by Rules 32.2(a)(3) and 33.2(a)(3), to read follows:

1 Claims for relief based on Rule 32.1(b) through (h) are not subject to
2 preclusion under Rule 32.2(a)(3). However, when a defendant raises a
3 claim that falls under Rule 32.1(b) through (h) in a successive or
4 untimely post-conviction notice, the defendant must explain the reasons
5 for not raising the claim in a previous notice or petition, or for not
6 raising the claim in a timely manner. If the notice does not provide
7 reasons why defendant did not raise the claim in a previous notice or
8 petition, or in a timely manner, the court may summarily dismiss the
9 notice. . . .

10 The April 5, 2019, amendment to Rules 32.2(b) and 33.2(b) improves the
11 Rules by ensuring that defendants cannot relitigate issues that have been finally
12 adjudicated on the merits in a prior proceeding, but the amendment will not prevent
13 defendants from raising new claims in piecemeal petitions. For example, under the
14 Task Force’s current amendment, a defendant could file three separate PCR petitions
15 raising claims under Rules 32.1(b) through (h), or 33.1(b) through (h). All three
16 petitions would be exempt from preclusion and presumably permissible unless
17 untimely.

18 To prevent piecemeal litigation, Rules 32.2(b) and 33.2(b) should impose a
19 requirement that defendants show “good cause” for not filing a claim in an earlier
20 petition. A good cause requirement does not foreclose relief for defendants in
21 exceptional cases where there may be valid reasons for raising claims in a successive
22 PCR petition, but it enforces Rule 32’s goal to “prevent endless or nearly endless
23 reviews of the same case in the same trial court.” *Shrum*, 220 Ariz. at 118, ¶ 12
24 (quoting *Stewart v. Smith*, 202 Ariz. 446, 450, ¶ 11 (2002)).
25

1 Therefore, APAAC recommends the following amendment to the April 5,
2 2009, Task Force Proposal for Rule 32.2(b):

3 Claims for relief based on Rule 32.1(b) through (h) are not subject to
4 preclusion under Rule 32.2(a)(3). However, when a defendant raises a
5 claim that falls under Rule 32.1(b) through (h) in a successive ~~or~~
6 ~~untimely~~ post-conviction notice, the defendant must ~~explain the reasons~~
7 establish good cause for not raising the claim in a previous notice or
8 petition, ~~or for not raising the claim in a timely manner~~. If the notice
9 does not ~~provide reasons~~ show good cause why the defendant did not
raise the claim in a previous notice or petition, ~~or in a timely manner~~,
the court may summarily dismiss the notice. . . .

10 And APAAC recommends the same amendment to the April 5, 2019 Task Force
11 Proposal for Rule 33.2(b):

12 Claims for relief based on Rule 33.1(b) through (h) are not subject to
13 preclusion under Rule 33.2(a)(3). However, when a defendant raises a
14 claim that falls under Rule 32.1(b) through (h) in a successive ~~or~~
15 ~~untimely~~ post-conviction notice, the defendant must ~~explain the reasons~~
16 establish good cause for not raising the claim in a previous notice or
17 petition, ~~or for not raising the claim in a timely manner~~. If the notice
18 does not ~~provide reasons~~ show good cause why the defendant did not
raise the claim in a previous notice or petition, ~~or in a timely manner~~,
the court may summarily dismiss the notice. . . .

19 The above amendments also remove references to untimely PCR petitions.

20 These provisions are no longer necessary because the Task Force’s proposed Rules
21 32.4(b)(3) and 33.4(b)(3) require that defendants file notices for claims under Rules
22 32.1(b) through (h) and Rules 33.1(b) through (h) “within a reasonable time after
23 discovering the basis for the claim,” making the timeliness of the petition a separate
24 inquiry.
25

1 **C. Rules 32.6(b) and 33.6(b) – The Proposed Rules Would Allow**
2 **Unnecessary and Burdensome Pre-Petition Discovery.**

3 “Rule 32 itself does not provide a process for obtaining discovery in PCR
4 proceedings.” *Canion v. Cole*, 210 Ariz. 598, 599, ¶ 7 (2005). As *Canion* explained,
5 “Rule 32 sets forth an orderly procedure, beginning with the filing of a notice and
6 petition, that facilitates consideration not only of a defendant’s claims for post-
7 conviction relief, but of discovery requests as well.” *Id.* at 600, ¶ 11. The current
8 procedure affords defendants the opportunity “to be heard” while “protect[ing] the
9 State from random discovery requests.” *Id.* Only after a defendant files a PCR
10 petition can he or she obtain discovery at the discretion of the trial court.
11

12 The Task Force proposes adding Rules 32.6(b) and 33.6(b) with the following
13 new discovery provisions:
14

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

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

24 According to the Task Force, these new provisions would “essentially codify”
25 *Canion* but “would also supersede *Canion* by allowing discovery after the filing of

1 a notice but before the filing of a petition.” (Pet. to Amend Rule 32, filed Jan. 10,
2 2019, at 12.)

3
4 APAAC opposes Rules 32.6(b)(1) and 33.6(b)(1). Discovery in PCR
5 proceedings is intentionally limited because “the State is entitled to a presumption
6 that [defendants’] convictions [are] regularly obtained and are valid.” *Canion*, 210
7 Ariz. at 600, ¶ 13. It is incumbent on defendants to raise claims that undermine that
8 presumption before demanding discovery from the State. Until the defendant
9 presents a colorable claim, it is unduly burdensome for the State to litigate discovery
10 requests posed by defendants in PCR proceedings.
11

12
13 **D. Rules 32.5(a) and 33.5(a) – The Task Force’s Petition May**
14 **Inadvertently Require Appointed Counsel in Successive PCR**
Proceedings Under Rules 32.5(a) and 33.5(a).

15 In noncapital cases, current Rule 32.4(b)(2) currently requires that defendants
16 receive appointed counsel in two situations: (1) upon filing a timely notice of PCR
17 or (2) after a defendant files a first notice of PCR. *See Osterkamp v. Browning*, 226
18 Ariz. 485, 489, ¶ 15 (App. 2011). In all other situations, the trial court has discretion
19 to appoint counsel. Ariz. R. Crim. P. 32.4(b)(2); *State v. McDonald*, 192 Ariz. 44,
20 45, ¶ 7 (App. 1998).
21

22
23 The Task Force’s proposed Rules 32.5(a) and 33.5(a), which govern the
24 appointment of counsel, are not intended to alter the current application of Rule
25 32.4(b)(2). The Task Force, however, has also proposed time limits for claims filed

1 under Rules 32.1(b) through (h) and 33.1(b) through (h). Those time limits may alter
2 the application of proposed Rules 32.5(a) and 33.5(a).

3
4 Post-conviction claims that are not subject to preclusion were previously
5 exempted from the time limits in Rule 32.4. *See* Ariz. R. Crim. P. 32.4(a)(2)(A).

6 Under the Task Force’s proposal, a defendant who files claims under Rules 32.1(b)
7 though (h), or 33.1(b) through (h), must file a notice “within a reasonable time after
8 discovering the basis of the claim.” Proposed Rules 32.4(b)(3)(B) & 33.4(b)(3)(B).
9

10 To the extent these claims are now considered “timely,” the Task Force’s proposed
11 Rules 32.5(a) and 33.3(5) could inadvertently require the appointment of counsel in
12 many successive PCR proceedings. Rules 32.5(a) and 33.5(a) should be clarified to
13 prevent this unanticipated consequence. First Rule 32.5(a) should be amended to
14 read:
15

16 **(a) Noncapital Cases.** No later than 15 days after the defendant has
17 filed a ~~timely~~ or first notice under Rule 32.4, the presiding judge must
18 appoint counsel for the defendant if each of the following applies:

- 19 (1) the defendant requests ~~it~~ counsel;
- 20 (2) the defendant is entitled to appointed counsel under Rule
21 6.1(b); and
- 22 (3) there has been a previous determination that the defendant
23 is indigent, or the defendant has completed ~~an~~ a affidavit
24 declaration of indigency and the court finds that the
25 defendant is indigent.

Upon filing of all other Rule 32 notices, the presiding judge or

1 the judge's designee may appoint counsel for an indigent
2 defendant.

3 Second, Rule 33.5(a) should be amended to read:

4 **(a) Generally.** No later than 15 days after the defendant has filed a
5 ~~timely~~ or first notice under Rule 33.4, or a notice under Rule
6 33.4(b)(3)(C), the presiding judge must appoint counsel for the
7 defendant if each of the following applies:

- 8 (1) the defendant requests it counsel;
- 9 (2) the defendant is entitled to an appointed counsel under
10 Rule 6.1(b); and
- 11 (3) there has been a previous determination that the defendant
12 is indigent, or the defendant has completed ~~an~~ a
13 declaration ~~affidavit~~ of indigency and the court finds that
14 the defendant is indigent.

14 Upon filing of all other Rule 33 notices, the presiding judge or the
15 judge's designee may appoint counsel for an indigent defendant ~~if~~
16 requested.

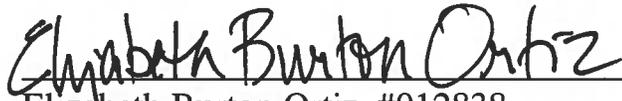
16 Removing references to “timely” filed petitions from Rules 32.5(a) and
17 33.5(a) will ensure that defendants receive appointed counsel consistent with the
18 application of current Rule 32.4.

20 **III. CONCLUSION**

21 The Arizona Prosecuting Attorneys’ Advisory Council recognizes and
22 commends the work of the Task Force on Rule 32 of the Arizona Rules of Criminal
23 Procedure. The Task Force achieved its goal of identifying substantive changes to
24 Rule 32 that improved upon the objectives of the Rule and the post-conviction relief
25

1 process. APAAC offers the suggestions in this Comment with the intent of
2 strengthening the proposed changes as set forth in the Task Force's petition.

3
4 RESPECTFULLY SUBMITTED this 15th day of April, 2019.

5 

6 Elizabeth Burton Ortiz, #012838
7 Executive Director
8 Arizona Prosecuting Attorneys'
Advisory Council

9 Electronic copy filed with the
10 Clerk of the Arizona Supreme Court
11 this 15 day of April, 2019.

12 By: 
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1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

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

9 In the Matter of:

Supreme Court No. R-19-0012

10 **PETITION TO AMEND RULE 32;**
11 **ADOPT NEW RULE 33; AMEND**
12 **VARIOUS RULE 41 FORMS AND**
13 **ADOPT NEW FORMS;**
14 **RENUMBER RULE 33 OF THE**
15 **ARIZONA RULES OF CRIMINAL**
16 **PROCEDURE; and ADOPT A**
17 **CONFORMING CHANGE TO**
18 **RULE 17.1(e) OF THE ARIZONA**
19 **RULES OF CRIMINAL**
20 **PROCEDURE**

COMMENT OF THE
STATE BAR OF ARIZONA

21 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar
22 of Arizona (the “State Bar”) hereby submits the following as its Comment to the
23 above-captioned Petition.

24 The analysis and details for this Comment are substantially the product of the
25 State Bar’s Criminal Practice and Procedure Committee, composed of a balance of
prosecution and defense practitioners, and judicial members.

1 **I. Background of Petition**

2 In January of 2018, this Court established a Task Force whose mandate was
3 to improve on the objectives of Rule 32, Ariz. Rules Crim. Pro., by identifying and
4 proposing substantive changes to the Rule. (Petition at 3). Petition R-19-0012 is
5 the result of the work of the Task Force.
6

7 **II. Discussion and Analysis**

8 The State Bar of Arizona supports the recommendations of the Petition with
9 some suggestions to modify the proposed Rule 32.6, Ariz. Rules Crim. Pro. These
10 are discussed below.
11

12 Proposed Rule 32 will govern post-conviction cases where the defendant
13 proceeds to trial or a hearing and does not plead guilty or admit to violating
14 probation. Proposed Rule 33 will be the rule governing of-right post-conviction
15 cases where there has been a plea or admission.
16

17 Proposed Rule 32.6(c) mandates the information that must be included in a
18 Notice when counsel determines that there are no colorable claims. The proposed
19 Rule contains 18 subsections detailing the information post-conviction counsel
20 must include in any such Notice. (See, Proposed Rule 32.6(c)).
21

22 An example of the information to be included is the following:
23

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

1 (7) any adverse rulings during trial on objections or
2 motions (e.g., objections regarding the admission of
3 exclusion of evidence, objections premised on
4 prosecutorial or judicial misconduct, mistrial motions,
5 motions for directed verdict);

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

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

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

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

14 Proposed Rule 26.6(c)(6)-(11).

15 Proposed subsections (6)-(11) are redundant in light of proposed subsection
16 (18) that requires post-conviction counsel to list any potential claims of ineffective
17 assistance of trial or appellate counsel. Additionally, since the cases under the new
18 Rule 32 will not be of-right petitions for post-conviction relief, but will involve
19 non-pleading defendants, the vast majority of the cases will proceed subsequent to
20 a direct appeal and will involve ineffective assistance of counsel claims. Further,
21 the proposed comment to 32.6(c) states:

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

1
2 Petition at Appendix 2.¹

3 There is inconsistency between the directive of proposed Rule 32.6(c),
4 mandating inclusion of a plethora of information regarding legal issues in a Notice
5 of No Colorable Claim, and a comment that implies that failure to follow the
6 dictates of the proposed rule is not a deviation from prevailing professional norms.
7 If the intent of the 18 enumerated subsections is actually to aid post-conviction
8 counsel in “reviewing the record to ensure that substantial justice is done,” as
9 opposed to detailing counsel’s work for the Court, it might be more efficacious to
10 include the enumerated subsections in the comment and identify them as a standard
11 for post-conviction counsel.
12

13
14 Regardless of whether the 18 subsections are intended to aid counsel or the
15 court, with so much information mandated for disclosure, it may well be appropriate
16 to add to the comment a directive that counsel must take care not to reveal client
17 confidences to the court in the Notice without the client’s informed consent. (*See*,
18 *Ariz. Rules Sup. Ct. 42, ER 1.6*).
19

20
21 The forms as submitted with the Amended Petition, propose clarifications
22
23

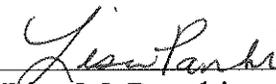
24 ¹ Appendix 2 of Petition R-19-0012 is devoid of any page numbers. Although the
25 proposed quoted language references a form, no proposed forms have been provided
with the initial Petition. (*See, Petition at p. 16, ¶7*).

1 and headings that make them more intuitive for self-represented defendants. A new
2 “Checklist for No Colorable Claims,” Form 25(b), will assist PCR counsel and
3 standardize self-represented petitioners. Similarly, the Request for the Record
4 (Form 26) includes modifications which clarify the form and provide better
5 guidance. The State Bar agrees with and supports these proposed changes.
6

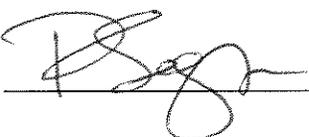
7 **CONCLUSION**

8 For the above-stated reasons, the State Bar of Arizona approves of Petition
9 R-19-0012, with the exception of Proposed Rule 32.6(c) and the comment thereto,
10 and respectfully requests that the Arizona Supreme Court not adopt proposed Rule
11 32.6(c) absent amendments that conform to the concerns raised in this Comment.
12

13
14
15 RESPECTFULLY SUBMITTED this 1st day of May, 2019.

16
17 
18 Lisa M. Panahi
19 General Counsel
20

21 Electronic copy filed with the
22 Clerk of the Supreme Court of Arizona
23 this 1st day of May, 2019.

24 by: 
25

Appendix 2-AP

Rule 32

For the May 10, 2019 Task Force Meeting

R32TF: Petition Appendix 2 AP

Proposed Rule 32, 04.05.2019, edit, May 10 2019 meeting version

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

Rule 32.1. Scope of Remedy

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

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

Grounds for Relief. Grounds for relief are:

- (a) the defendant's conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions;
- (b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) the sentence, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law;
- (d) the defendant continues to be or will continue to be in custody after his or her sentence expired;
- (e) newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. Newly discovered material facts exist if:
 - (1) the facts were discovered after the trial or sentencing;
 - (2) the defendant exercised due diligence in discovering these facts; and
 - (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence.
- (f) the failure to timely file a notice of appeal was not the defendant's fault;
- (g) there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence; or
- (h) the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the

R32TF: Petition Appendix 2 AP

Proposed Rule 32.04.05.2019.edit.May 10 2019 meeting version

defendant guilty of the offense beyond a reasonable doubt, or that no reasonable fact-finder would have imposed the death penalty.

COMMENT

Rule 32. 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 United States or Arizona constitutions.

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

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 need not comply with the requirements of Rule 32.1(h).

Rule 32.2. Preclusion of Remedy

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

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

(b) Claims Not Precluded. Claims for relief based on Rule 32.1(b) through (h) are not subject to preclusion under Rule 32.2(a)(3). However, when a defendant raises a claim that falls under Rule 32.1(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. A court at any time may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

Commented [MM1]: THIS MAY CONFLICT WITH RULE 32.16(c)(4).

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R32TF: *Petition Appendix 2 AP*

Proposed Rule 32, 04.05.2019.edit.May 10 2019 meeting version

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

- (a) **Generally.** A post-conviction proceeding is part of the original criminal action and is not a separate action. It displaces and incorporates all trial court post-trial remedies except those obtainable by Rule 24 motions and habeas corpus.
- (b) **Other Applications or Requests for Relief.** If a court receives any type of application or request for relief—however titled—that challenges the validity of the defendant’s conviction or sentence following a trial, it must treat the application as a petition for post-conviction relief. If that court is not the court that convicted or sentenced the defendant, it must transfer the application or request for relief to the court where the defendant was convicted or sentenced.
- (c) **Defendant Sentenced to Death.** A defendant sentenced to death in a capital case must proceed under Rule 32 rather than Rule 33 for all post-conviction issues, even if the defendant pled guilty to first-degree murder or other crimes.

(e)

COMMENT

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

Rule 32 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. See A.R.S. §§ 13-4121 et seq., which provides a remedy for individuals who are unlawfully committed, detained, confined, or restrained. But if a convicted defendant files a petition for a writ of habeas corpus (or an application with a different title) that seeks relief available under Rule 32, the petition or application will be treated as a petition for post-conviction relief.

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

Rule 32.4. Filing a Notice Requesting Post-Conviction Relief

- (a) **Generally.** A defendant starts a Rule 32 proceeding by filing a Notice Requesting Post-Conviction Relief.
- (b) **Notice Requesting Post-Conviction Relief.**
 - (1) **Where to File; Forms.** A defendant must file a notice requesting post-conviction relief under Rule 32 in the court where the defendant was sentenced. The court must make “notice” forms available for defendants.

R32TF: Petition Appendix 2 AP

Proposed Rule 32, 04.05.2019.edit.May 10 2019 meeting version

- (2) **Content of the Notice.** The notice must contain the caption of the original criminal case or cases to which it pertains, and all information shown in Rule 41, Form ~~24~~(b).
- (3) **Time for Filing.**
- (A) **Claims under Rule 32.1(a).** A defendant must file the notice for a claim under Rule 32.1(a) within 90 days after the oral pronouncement of sentence or within 30 days after the issuance of the mandate in the direct appeal, whichever is later.
- (B) **Claims under Rule 32.1(b) through (h).** A defendant must file the notice for a claim under Rule 32.1(b) through (h) within a reasonable time after discovering the basis of the claim.
- (C) **Time for Filing a Notice in a Capital Case.** In a capital case, the Supreme Court clerk must expeditiously file a notice of post-conviction relief with the trial court upon the issuance of the mandate affirming the defendant's conviction and sentence on direct appeal.
- (D) **Excusing an Untimely Notice.** The court must excuse an untimely notice of post-conviction relief filed under subpart (3)(A) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault.
- (4) **Duty of the Clerk upon Receiving a Notice.**
- (A) **Superior Court.** Upon receiving a notice, the superior court clerk must file the notice in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, defendant's counsel, the prosecuting attorney's office, and the Attorney General. The clerk must note in the record the date and manner of sending copies of the notice.
- (B) **Justice or Municipal Court.** If the conviction occurred in a limited jurisdiction court, upon receiving a notice from a defendant, the limited jurisdiction court clerk must send a copy of the notice to the prosecuting attorney who represented the State at trial, and to defendant's counsel or the defendant, if self-represented. The clerk must note in the record the date and manner of sending copies of the notice.
- (C) **Notice to an Appellate Court.** If an appeal of the defendant's conviction or sentence is pending, the clerk must send a copy of the notice of post-conviction relief to the appropriate appellate court within 5 days of its

Commented [BCB3]: Here is another one of those smart quote first other quotes. I just want all of them to be the same and it seems the ones that have been used are these, ' not these, ' . I am going to try to catch them all.

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Proposed Rule 32, 04.05.2019.edit.May 10 2019 meeting version

filing and must note in the record the date and manner of sending the copy.

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

PROPOSED COMMENT

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

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

If a petition is filed while an appeal is pending, the appellate court, under Rule 31.3(b), may suspend the appeal until the petition is adjudicated. Any appeal from the decision on the petition will then be joined with the appeal from the judgment or sentence. See Rule 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 defendant has filed a timely or first notice under Rule 32.4, the presiding judge must appoint counsel for the defendant if:

- (1) the defendant requests it;
- (2) the defendant is entitled to appointed counsel under Rule 6.1(b); and
- (3) there has been a previous determination that the defendant is indigent, or the defendant has completed an affidavit declaration of indigency and the court finds that the defendant is indigent.

Upon filing of all other Rule 32 notices, the presiding judge or the judge's designee may appoint counsel for an indigent defendant.

- (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

Commented [MM4]: STAFF AGREES WITH APAAC'S PROPOSED CHANGES.

R32TF: Petition Appendix 2 AP

Proposed Rule 32, 04.05.2019.edit.May 10 2019 meeting version

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~~.

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

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

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

(b) Discovery.

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

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

(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;

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

In the notice, counsel should also identify the following:

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

~~(18)~~—

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Proposed Rule 32, 04.05.2019.edit.May 10 2019 meeting version

- (d) **Self- Represented Defendant's *Pro-Se* Petition.** Upon receipt of counsel's notice under section (c), the defendant may file a petition on his or her own behalf. The court may extend the time for the defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.
- (e) **Counsel's Duties after Filing a Notice ~~under Under~~ Section (c).** After counsel files a notice under section (c) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the post-conviction proceeding.
- (f) **Attorney-Client Privilege.** By raising any claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim, as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4).

PROPOSED COMMENT TO RULE 32.6(b)

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

PROPOSED COMMENT TO RULE 32.6(c)

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

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.

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(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 a~~After considering the rights of the victim, the court may grant additional extensions for good cause.

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

(c) Length of Petition.

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

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

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

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

(f) Effect of Non-Compliance. The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 40 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling.

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Rule 32.8. Transcript Preparation

- (a) **Request for Transcripts.** If the verbal record of trial court proceedings were was not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request.
- (b) **Order Regarding Transcripts.** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant has specified in the notice.
- (c) **Deadlines.** The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no later than 60 days after the entry of an order granting the defendant's request for transcripts.
- (d) **Cost.** If the defendant is indigent, the transcripts must be prepared at county expense.
- (e) **Unavailability of Transcripts.** If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 32.9. Response and Reply; Amendments

(a) State's Response.

- (1) **Deadlines.** The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.
- (2) **Contents.** The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.
- (b) **Defendant's Reply.** The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.
- (c) **Length of Response and Reply.**

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- (1) **Non-Capital Cases.** In noncapital cases, the State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.
- (2) **Capital Cases.** In capital cases, the State's response must not exceed 160 pages, and defendant's reply must not exceed 80 pages.
- (d) **Amending the Petition.** After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 32.10. Assignment of a Judge

- (a) **Generally.** The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. The provisions of Rules 10.1 and 10.2 apply in proceedings for post-conviction relief when the case is assigned to a new judge.
- (b) **Dispute Regarding Public Records.** The assigned judge may hear and decide a dispute within its jurisdiction, whether the dispute is raised by motion or by special action, which concerns access to public records requested for a post-conviction proceeding.

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

- (a) **Summary Disposition.** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.
- (b) **Setting a Hearing.** If the court does not summarily dismiss the petition, it must set a status conference or a hearing within 30 days.
- (c) **Notice to Victim.** If the court sets a hearing, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.
- (d) **Defendant's Competence.** The court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim.

Rule 32.12. Informal Conference

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

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- (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.

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Rule 32.14. Motion for Rehearing

- (a) **Timing and Content.** No later than 15 days after entry of the trial court's final decision on a petition, any party aggrieved by the decision may file a motion for rehearing. The motion must state in detail the grounds of the court's alleged errors.
- (b) **Response and Reply.** An opposing party may not file a response to a motion for rehearing unless the court requests one, but the court may not grant a motion for rehearing without requesting and considering a response. If a response is filed, the moving party may file a reply no later than 10 days after the response is served.
- (c) **Stay.** The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court.
- (d) **Effect on Appellate Rights.** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 32.16.
- (e) **Disposition if Motion Granted.** If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing or grant a new hearing and then either amend or reaffirm its previous ruling. ~~In either case, it~~ **The court** 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 defendant's counsel or the defendant, if self-represented, must ~~send file any final rulings to in~~ the appellate court within 10 days after the ruling is filed ~~any trial court rulings granting or denying relief on the defendant's notice or petition for post-conviction relief, or any motion for rehearing.~~

Rule 32.16. Petition and Cross-Petition for Review

(a) Time and Place for Filing.

- (1) **Petition.** No later than 30 days after the entry of the trial court's final decision on a petition or a motion for rehearing, or the dismissal of a notice, an aggrieved party may petition the appropriate appellate court for review of the decision.
- (2) **Cross-Petition.** The opposing party may file a cross-petition for review no later than 15 days after a petition for review is served.

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(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 must include the appellate case number.** The notice of filing may designate additional items for the record described in section (j). These items may include additional certified transcripts of trial court proceedings prepared under Rule 32.13(e), or that were otherwise available to the trial court and the parties, and are material to the issues raised in the petition or cross-petition for review.

Commented [MM5]: Wouldn't this information be useful for the trial court clerk in transmitting records under section (j)?

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

(1) **Form and Length.** Petitions and cross-petitions for review, along with other documents filed with the appellate clerk, must comply with the formatting requirements of Rule 31.6(b). The petition or cross-petition must contain a caption with the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number, and a brief descriptive title. The caption must designate the parties as they appear in the trial court's caption. The petition or cross-petition for review must not exceed 6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings. However, a petition for review and a response to a petition for review in a capital case must not exceed 12,000 words **IF TYPED** or **50-44** 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:

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- (A) copies of the trial court’s rulings entered under Rules 32.2, 32.11, 32.13, and 32.14;
- (B) a statement of issues the trial court decided that the defendant is presenting for appellate review;
- (C) a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and
- (D) reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

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

(3)(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).

Commented [MM6]: THIS MAY CONFLICT WITH RULE 32.2(b).

Commented [MM7]: Two comments. First, the last sentence (“an appendix is not required”) is somewhat conflicting with the first sentence, which provides that the court may require an appendix. Second, the substance of the last sentence would fit better with subpart (c), the content of the petition.

Commented [MM8]: Rule 32.16(a)(4) allows a request to extend the time to file a petition even after the deadline has passed. Does the same principle apply to the response?

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- (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 under Rule 32.
- (i) **Stay Pending Appellate Review.** The State's filing of a petition for review of an order granting a new trial automatically stays the order until appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting a stay pending further review is within the discretion of the trial court.
- (j) **Transmitting the Record to the Appellate Court.** No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record to the appellate court. The record includes copies of the notice of post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings responses, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, any exhibits admitted by the trial court in the post-conviction proceedings, and any documents or transcripts designed under section (b).
- (k) **Disposition.** The appellate court may grant review of the petition for cross petition? and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper.
- (l) **Reconsideration or Review of an Appellate Court Decision.** The provisions in Rules 31.20 and 31.21 relating to motions for reconsideration and petitions for review in criminal appeals govern motions for reconsideration and petitions for review of an appellate court decision entered under section (k).
- (m) **Return of the Record.** After the disposition of the petition a petition is resolved, the appellate clerk must return the record to the trial court clerk.

Commented [MM9]: This provision does not provide any requirements for the substance of a response. Should it?

Commented [MM10]: Should this be "but must not" include an appendix?

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

Rule 32.17. Post-Conviction Deoxyribonucleic Acid Testing

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

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

Commented [MM11]: Is the comma here appropriate?

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- (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.

Commented [MM12]: Does "this rule" refer to Rule 32.17 only, or to the entirety of Rule 32? Does "the proceeding" refer to a Rule 32 proceeding, or to a proceeding for DNA testing?

(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

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32.1 as a matter of law. If requested, a victim must be given notice of this hearing.

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

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

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

No later than 10 days after the trial court makes a finding on intellectual disability, the State or the defendant may file with the Court of Appeals a petition for special action challenging the finding. The Rules of Procedure for Special Actions govern the special action, except the Court of Appeals must accept jurisdiction and decide any issue raised.

Commented [MM13]: The title of the rule is not part of the rule, and the text of the rule does not refer to capital cases. Should "in capital cases" be added after "on intellectual disability?"

Rule 32.20. Extensions of Time in a Capital Case; Victim Notice and Service

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

(b) Manner and Timing of Service or Notice.

(1) Victim's Choice of the Manner of Service. The victim may specify in the notice of appearance whether the service of the request should be to the victim or whether it should go to another person, including the prosecutor, and whether service of the notice should be electronic, by telephone, or by regular mail. Service must be made in the manner specified in the victim's notice of appearance or, if no method-manner 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

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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.

Appendix 3-AP

Rule 33

For the May 10, 2019 Task Force Meeting

F

Rule 33. Post-Conviction Relief for ~~§~~ Defendants Who Pled Guilty ~~or No Contest~~, ~~or~~ Who Admitted a Probation Violation, ~~or Who Had an Automatic Probation Violation~~

Rule 33.1. Scope of Remedy

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

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

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

Grounds for Relief. Grounds for relief are:

- (a) the defendant's plea or admission to a probation violation was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions;
- (b) the court did not have subject matter jurisdiction to render a judgment or to impose a sentence on the defendant;
- (c) the sentence, as imposed ~~by the judge or as computed by the Arizona Department of Corrections~~, is not authorized by law or by the plea agreement;
- (d) the defendant continues to be or will continue to be in custody after his or her sentence expired;
- (e) newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. Newly discovered material facts exist if:
 - (1) the facts were discovered after sentencing;
 - (2) the defendant exercised due diligence in discovering these facts; and
 - (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of such critical significance that the impeachment evidence probably would have changed the judgment or sentence.
- (f) the failure to timely file a notice of post-conviction relief was not the defendant's fault;

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

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

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 United States or Arizona constitutions.

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

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 **or no contest** to the offense;
- (2) finally adjudicated on the merits in any previous post-conviction proceeding;
- (3) waived in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

(b) Claims Not Precluded.

- (1) **Generally.** Claims for relief based on Rule 33.1(b) through (h) are not subject to preclusion under Rule 33.2(a)(3). However, when a defendant raises a claim that falls under Rule 33.1(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons

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for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

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

Commented [MM1]: IS THE WORD 'TIMELY' NECESSARY?

NEW COMMENT TO RULE 33.2(a)(1)

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

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

(a) Generally. A post-conviction proceeding is part of the original criminal action and is not a separate action. It replaces and incorporates all trial court post-plea remedies except those obtainable by Rule 24 motions and habeas corpus.

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

COMMENT

This rule provides that all Rule 33 proceedings are to be treated as criminal actions. The characterization of the proceeding as criminal assures compensation for appointed counsel, and the applicability of criminal standards for admissibility of evidence at an evidentiary hearing, except as otherwise provided.

Rule 33 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. See A.R.S. §§ 13-4121 et seq., which provides a remedy for individuals

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

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

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

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

(b) Notice Requesting Post-Conviction Relief.

- (1) *Where to File; Forms.*** The defendant must file a notice requesting post-conviction relief under Rule 33 in the court where the defendant was sentenced. The court must make "notice" forms available for defendants.
- (2) *Content of the Notice.*** The notice must contain the caption of the original criminal case or cases to which it pertains, and all information shown in Rule 41, Form ~~24~~(b).
- (3) *Time for Filing.***
 - (A) *Claims Under Rule 33.1(a).*** A defendant must file the notice for a claim under Rule 33.1(a) within 90 days after the oral pronouncement of sentence.
 - (B) *Claims Under Rules 33.1(b) through (h).*** A defendant must file the notice for a claim under Rules 33.1(b) through (h) within a reasonable time after discovering the basis for the claim.
 - (C) *Successive Notice for Claims of Ineffective Assistance of Rule 33 counsel.*** A defendant may raise a claim of ineffective assistance of Rule 33 counsel in a successive Rule 33 proceeding if the defendant files a notice no later than 30 days after the trial court's final order in the first post-conviction proceeding, or, if the defendant seeks appellate review of that order, no later than 30 days after the appellate court issues its mandate in that proceeding.
 - (D) *Excusing an Untimely Notice.*** The court must excuse an untimely notice of post-conviction relief filed under subpart (3)(A) or (3)(C) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault.

Commented [BCB2]: This margin needs to be fixed so that the sentence right above it is flush to the left margin. I think the sentence above needs to move to the left instead of the beginning of the next sentence moving to the right.

Commented [BCB3]: I know this is very picky but this is the only what I call a "smart quote" that I have found. The others are the straight quote or apostrophe marks. We just need a global search so they are all the same. I am going to change this one. I found a lot of different ones in Rule 32. We just need to decide which one looks better.

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

(A) *Superior court.* Upon receiving a notice, the superior court clerk must file it in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, defendant's ~~se~~ 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 Requesting~~ 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 Requesting~~ Post-Conviction Relief also assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

Rule 33.5. Appointment of Counsel

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

- (1) the defendant requests it;
- (2) the defendant is entitled to an appointed counsel under Rule 6.1(b); and
- (3) there has been a previous determination that the defendant is indigent, or the defendant has completed ~~an a declaration affidavit~~ of indigency and the court finds that the defendant is indigent.

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

(b) **Appointment of Investigators, Expert Witnesses, and Mitigation Specialists.** On application and if the trial court finds that such assistance is reasonably necessary for

Commented [BCB4]: Just making it the same as 32.4(b)(4)(A).

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

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

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

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

(b) Discovery.

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

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

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

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

In the notice, counsel should also identify the following:

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~~(6)~~ that the plea agreement contains the correct classification of offenses and the correct sentencing range of each offense;

~~(6)~~~~(7)~~ 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)~~~~(8)~~ any determination of the defendant's competency that was raised prior to sentencing;

~~(8)~~~~(9)~~ any objections raised at the time of sentencing;

~~(9)~~~~(10)~~ the court's determination of the classification and category of offenses for which the defendant was sentenced under the plea agreement;

~~(11)~~ any aggravating factors are supported by the record;

~~(12)~~ the court considered any mitigation evidence that was offered;

~~(10)~~~~(13)~~ the court's determination of pre-sentence incarceration credit;

~~(14)~~ the sentence imposed by the court; and

~~(11)~~~~(15)~~ if a sentence above the presumptive term was imposed, the court relied on at least one proven statutory aggravating factor; and

~~(12)~~~~(16)~~ any potential claims of ineffective assistance of counsel.

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

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

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

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

COMMENT TO RULE 33.6(b)

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

(f)

PROPOSED COMMENT TO RULE 33.6(c)

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

Commented [BCB5]: Rule 32.6(b) has a comment that says, "The standard in this rule for pre-petition discovery is derived from rule 15.1(g). I thought was also wanted that here as well. Additionally, in the comment to 32.6(c), the following sentence stricken:
"Failure to complete Form 25(b), or to identify any issues listed in Rule 32.6(c) does not constitute a per se deviation . . ." But it wasn't stricken here.

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 or 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) Effects of Non-Compliance. The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the

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petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 40 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling.

Rule 33.8. Transcription Preparation

- (a) **Request for Transcripts.** If the verbal record of trial court proceedings were was not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request.
- (b) **Orders Regarding Transcripts.** The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant has specified in the notice.
- (c) **Deadlines.** The defendant's deadline for filing a petition is extended by the time between the defendant's request and either the transcripts' final preparation or the court's denial of the request. Certified transcripts must be prepared and filed no later than 60 days after the entry of an order granting the defendant's request for transcripts.
- (d) **Cost.** If the defendant is indigent, the transcripts must be prepared at county expense.
- (e) **Unavailability of Transcripts.** If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

- (1) **Deadlines.** The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim.
- (2) **Contents.** The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

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- (b) **Defendant's Reply.** The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.
- (c) **Length of Response and Reply.** The State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.
- (d) **Amending the Petition.** After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 33.10. Assignment of a Judge

- (a) **Generally.** The presiding judge must, if possible, assign a proceeding for post-conviction relief to the sentencing judge. The provisions of Rules 10.1 and 10.2 apply in proceedings for post-conviction relief when the case is assigned to a new judge.
- (b) **Dispute Regarding Public Records.** The assigned judge may hear and decide a dispute within its jurisdiction, whether the dispute is raised by motion or by special action, which concerns access to public records requested for a post-conviction proceeding.

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

- (a) **Summary Disposition.** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.
- (b) **Setting a Hearing.** If the court does not summarily dismiss the petition, it must set a status conference or a hearing within 30 days.
- (c) **Notice to the Victim.** If the court sets a hearing, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.
- (d) **Defendant's Competence.** The court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim.

Rule 33.12. Informal Conference

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

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

Rule 33.13. Evidentiary Hearing

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

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

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

(d) Decision.

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

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

(A) the conviction, sentence, or detention;

(B) any further proceedings, including setting the matter for trial and conditions of release; and

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

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

Rule 33.14. Motion for Rehearing

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

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- (b) **Response and Reply.** An opposing party may not file a response to a motion for rehearing unless the court requests one, but the court may not grant a motion for rehearing without requesting and considering a response. If a response is filed, the moving party may file a reply no later than 10 days after the response is served.
- (c) **Stay.** The State's filing of a motion for rehearing automatically stays an order granting a new trial until the trial court decides the motion. For any relief the trial court grants to a defendant other than a new trial, whether to grant a stay pending further review is within the discretion of the trial court.
- (d) **Effect on Appellate Rights.** Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 33.16.
- (e) **Disposition if Motion Granted.** If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing or grant a new hearing and then either amend or reaffirm its previous ruling. ~~In either case, it~~ The court 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.

Commented [BCB6]: We took "in either case" out of 32.14(e) after the last TF meeting so I assume we want it out of here as well.

Rule 33.15. Notification to the Appellate Court

If a petition for review of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must file any FINAL ruling in the appellate court ~~a notice of any relief granted or denied by the trial court within 10 days after the ruling is filed.~~

Commented [MM7]: THE WORD "FINAL" IS IN RULE 32.15.

Rule 33.16. Petition and Cross-Petition for Review

(a) Time and Place for Filing.

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

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(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.

~~(4)~~(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 (i). These items may include additional certified transcripts of trial court proceedings prepared under Rule 33.13(e), or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition or cross-petition for review.

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

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

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

- (A)** copies of the trial court's rulings entered under Rules 33.2, 33.11, 33.13, and 33.14;
- (B)** a statement of issues the trial court decided that the defendant is presenting for appellate review;
- (C)** a statement of material facts concerning the issues presented for review, including specific references to the record for each material fact; and
- (D)** reasons why the appellate court should grant the petition, including citations to supporting legal authority, if known.

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- (3) **Effect of a Motion Rehearing.** The filing of a motion for rehearing under Rule 33.14 does not limit the issues a party may raise in a petition or cross-petition for review.
- (4) **Waiver.** A party's failure to raise any issue that could be raised in the petition or cross-petition for review constitutes a waiver of appellate review of that issue.
- (d) **Appendix Accompanying a Petition or Cross-Petition.** Unless otherwise ordered, a petition or cross-petition may be accompanied by an appendix. The petition or cross-petition must not incorporate any document by reference, except the appendix. An appendix that exceeds 15 pages in length, exclusive of the trial court's rulings, must be submitted separately from the petition or cross-petition. An appendix is not required, but the petition must contain specific references to the record to support all material factual statements.
- (e) **Service of a Petition for Review, Cross-Petition for Review, Reply, or Related Filing.** A party filing a petition, cross-petition, appendix, response, or reply, or another filing, must serve a copy of the filing on all other parties. The serving party must file a certificate of service complying with Rule 1.7(c)(3), identifying who was served and the date and manner of service.
- (f) **Response to a Petition or Cross-Petition for Review; Reply.**
 - (1) **Time and Place for Filing a Response; Extensions of Time.**
 - (A) No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate court. Rule 31.3(d) governs computation of the deadline for filing the response.
 - (B) A party may file a motion with the appellate court for an extension of the time to file a response or reply in accordance with Rule 31.3(e).
 - (2) **Form and Length of Response.** The response must not exceed 6,000 words if typed and 22 pages if handwritten, exclusive of an appendix, and must comply with the form requirements in subpart (c)(1) An appendix to a response must comply with the form and substantive requirements in section (d).
 - (3) **Reply.** No later than 10 days after a response is served, a party may file a reply. The reply is limited to matters addressed in the response and may not exceed 3,000 words if typed and 11 pages if handwritten. It also must comply with the requirements in subpart (c)(21) and may not include an appendix.

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- (g) **Computing and Modifying Appellate Court Deadlines.** Except as otherwise provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in this rule. **An appellate court may modify any deadline in accordance with Rule 31.3(e).**
- (h) **Amicus Curiae.** Rules 31.13(a)(7) and 31.15 govern filing and responding to an amicus curiae brief.
- (i) **Stay Pending Appellate Review.** The State's filing of a petition for review of an order granting a new trial automatically stays the order until appellate review is completed. For any relief the trial court grants to a defendant other than a new trial, granting a stay pending further review is within the discretion of the trial court.
- (j) **Transmitting the Record to the Appellate Court.** No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record **to the appellate court.** The record includes copies of the notice of post-conviction relief, the petition for post-conviction relief, response and reply, all motions and **responsive pleadings responses**, all minute entries and orders issued in the post-conviction proceedings, transcripts filed in the trial court, any exhibits admitted by the trial court in the post-conviction proceedings, and any documents or transcripts designed under section (b).
- (k) **Disposition.** The appellate court may grant review of the petition and may order oral argument. Upon granting review, the court may grant or deny relief and issue other orders it deems necessary and proper.
- (l) **Reconsideration or Review of an Appellate Court Decision.** The provisions in Rules 31.20 and 31.21 relating to motions for reconsideration and petitions for review in criminal appeals govern motions for reconsideration and petitions for review of an appellate court decision entered under section (k).
- (m) **Return of the Record.** After **a petition for review is resolved, the disposition of the petition for review**, the appellate clerk must return the record to the trial court clerk.
- (n) **Notice to the Victim.** Upon the victim's request, the State must notify the victim of any action taken by the appellate court.

Rule 33.17. Post-Conviction Deoxyribonucleic Acid Testing

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

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- (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

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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. If requested, a victim must be given notice of this hearing.

Appendix 1-AP

Rule 17.1

Proposed amendment to Rule 17.1(e)

Deletions are shown by strikethrough. Additions are shown by underline.

Rule 17.1. The Defendant's Plea

(a) through (d) No change

(e) **Waiver of Appeal.** ~~By pleading~~A defendant who pleads guilty or no contest in a noncapital case, ~~a defendant~~ waives the right to file a notice of appeal and to have the an appellate courts review the proceedings on a direct appeal under Rule 31. ~~However, Aa~~ defendant who pleads guilty or no contest may seek relief in the trial court review only by filing a Notice Requesting Post-Conviction Relief and a Petition for ~~petition~~^[BCB1] ~~for~~ Post-Conviction Relief under Rule ~~32 33~~ and, if it is denied, a petition for review.

(f) No change

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

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

STATE OF ARIZONA, Plaintiff

[CASE/COMPLAINT NO.]

-vs-

Defendant (first, middle, and last name)

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

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

RIGHT TO APPEAL

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

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

EXERCISING YOUR RIGHT TO APPEAL

1. Notice of Appeal. If you want to appeal from a judgment of conviction and imposition of sentence, you must file a Notice of Appeal (Form 24(a)) within 20 days after the court's oral pronouncement of your sentence in the courtroom. If you want to appeal from any other appealable judgment or order, you must file a Notice of Appeal (Form 24(a)) no later than 20 days after entry of the judgment or order. You will lose your right to appeal if you do not file a Notice of Appeal within the time required.

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

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

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

RIGHT TO POST-CONVICTION RELIEF

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

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

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

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

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

(c) If you did not have a right to appeal but you had a first post-conviction proceeding and wish to raise a claim that post-conviction counsel was ineffective in a successive post-conviction proceeding. If you did not have the right to appeal but you did seek post-conviction relief in a first proceeding but you claim your attorney in that proceeding was ineffective, you must file a Notice Requesting Post-Conviction Relief within 30 days after the trial court enters its final order or, if you sought appellate review of that order, no later than 30 days after the appellate court issues an order and mandate in that first proceeding.

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

4. Requesting a Lawyer. If you want a lawyer to represent you in your post-conviction proceeding and you cannot afford to hire a lawyer, you must sign the declaration of indigency contained in the Notice Requesting Post-Conviction Relief and ask the court to appoint a lawyer to represent you.

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

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

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

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

RECEIPT BY DEFENDANT

I have received a copy of this notice.

Date

Defendant's Signature

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

_____ COUNTY _____ County, Arizona

STATE OF ARIZONA, Plaintiff

[CASE/COMPLAINT NO.]

-vs-

Defendant (first, middle, and last name)

**NOTICE OF RIGHTS
AFTER SENTENCING IN A
CAPITAL CASE**

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

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

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

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

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

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

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

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

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

RECEIPT BY DEFENDANT

I have received a copy of this notice.

Date

Defendant's Signature

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

Court Name or Location: _____

County: _____

STATE OF ARIZONA,
Plaintiff,

Case number: _____

vs.

**NOTICE REQUESTING
POST-CONVICTION RELIEF**

Defendant's Name

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

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

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

A. INFORMATION ABOUT THE DEFENDANT:

1. Name (first, middle, and last): _____
2. Date of Birth: _____
3. Mailing address: _____
City, State, Zip Code: _____
4. Is the Defendant currently in jail or prison? **Yes** **No**
If yes, the defendant's inmate number is: _____

B. INFORMATION ABOUT THE DEFENDANT'S SENTENCE:

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

4. The Defendant received the following sentence:

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

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

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

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

C. POST-CONVICTION RELIEF CLAIM:

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

1. Is the Defendant raising a claim under **Rule 32.1(a)**? **Yes** **No**
If yes, this notice is being timely filed:
 within 90 days after the **oral pronouncement** of sentence,
OR
 within 30 days after the issuance of the mandate in the **direct appeal**.
OR
 This notice is not timely, but that is not the defendant's fault because:

2. Is the Defendant raising a claim under **Rule 33.1(a)**? **Yes** **No**
If yes, this notice is being timely filed:
 within 90 days after the oral pronouncement of sentence,
OR
 The Defendant is raising a claim that the Defendant received **ineffective assistance** of Rule 33 counsel in Defendant's first Rule 33 proceeding **AND**
This notice is being filed:
 no later than 30 days after the **trial court's final order** in the first post-conviction proceeding
OR
 if the defendant requested appellate review of that order, no later than 30 days after the **appellate court issued its mandate** in that proceeding
OR
 This notice is not timely, but that is not the defendant's fault because:

3. Is the Defendant raising a claim under **Rule 32.1(b)-(h)** or **Rule 33.1(b)-(h)**?
 Yes **No**
If yes, check all boxes that apply.
 The court did not have **subject matter jurisdiction** to render a judgment or impose a sentence on the Defendant [Rule 32.1(b) or 33.1(b)]

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

- The sentence as imposed is **not authorized by law**, or, if the Defendant entered a plea, the sentence is **not authorized** by the plea agreement. [Rule 32.1(c) or 33.1(c)]
- The Defendant continues to be or will continue to be **in custody after the sentence expires** [Rule 32.1(d) or 33.1(d)]
- Newly discovered material facts** probably exist, and those facts probably would have changed the judgment or sentence [Rule 32.1(e) or 33.1(e)]
- The **failure to timely file a notice** of appeal or a notice of post-conviction relief was not the Defendant's fault [Rule 32.1(f) or 33.1(f)]
- There has been a **significant change in the law** that, if applicable to the Defendant's case, would probably overturn the Defendant's judgment or sentence [Rule 32.1(g) or 33.1(g)]
- There is **clear and convincing evidence** that the facts underlying the Defendant's claim are sufficient to establish that no reasonable fact-finder would find the Defendant guilty of the offense beyond a reasonable doubt [Rule 32.1(h) or 33.1(h)]

The Defendant:

- has raised each claim within a reasonable time after learning of the claim,
- OR**
- has failed to timely file a notice, but that is not the defendant's fault because:

REQUEST FOR POST-CONVICTION RELIEF

I am requesting post-conviction relief. I understand that my petition for post-conviction relief must include every ground for relief that is known to me that has not been previously raised and decided.

Date

Defendant's signature

REQUEST FOR AN ATTORNEY AND DECLARATION OF INDIGENCY

I request the court to appoint an attorney to represent me in this post-conviction proceeding.

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

I declare under penalty of perjury that the foregoing is true and correct.

Date

Defendant's Signature

Form 25. Petition for Post-Conviction Relief

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

STATE OF ARIZONA, Plaintiff

[CASE/COMPLAINT NO.]

-vs-

Defendant (FIRST, MI, LAST)

**PETITION FOR POST-
CONVICTION RELIEF UNDER**
 RULE 32
 RULE 33

INSTRUCTIONS TO THE DEFENDANT

- (1) You must file a Notice Requesting Post-Conviction Relief (Form 24(b)) before you file this petition.
- (2) Answer the questions in this petition in readable handwriting or by typing. Use additional blank pages for completing your answers, if necessary, but write on only one side of the page.
- (3) Indicate above whether you are filing this petition under **Rule 32** or **Rule 33**. If you are filing under **Rule 32**, answer question **2**. If you are filing under **Rule 33**, answer question **3**.
- (4) Do not raise issues you have already raised on your appeal (if any) or in a previous petition for post-conviction relief (if any). Include in this petition every ground for relief you are aware of and that has not been raised and decided before. If you do not raise a ground now, you will not be able to raise it later.
- (5) File your complete petition with the clerk of the court where you were convicted and sentenced (or mail it to the clerk of that court for filing.)

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

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

1. INFORMATION ABOUT THE DEFENDANT

Name: _____

Current Status: On Probation Incarcerated On Parole On Community Supervision

Inmate number (if any): _____

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

- Rule 32.1(a):** The defendant's conviction was obtained, or the defendant's sentence was imposed, in violation of the United States or Arizona constitutions, specifically:
 - The Defendant was denied the constitutional right to representation by a **competent and effective lawyer** at every critical stage of the proceeding.
 - The State used evidence at trial it obtained during an **unlawful arrest**.
 - The State used evidence at trial it obtained during an **unconstitutional search and seizure**.
 - The State used an **identification** at trial that violated the Defendant's constitutional rights.

- The State used a **coerced confession** at trial; used a statement obtained in the absence of a lawyer, at a time when representation by a lawyer was constitutionally required; or there was other infringement of the Defendant's right against self-incrimination.
- The State **suppressed** favorable evidence.
- The State used **perjured testimony**.
- There was a violation of the defendant's right not to be placed **twice in jeopardy** for the same offense or punished twice for the same act.
- To determine the defendant's sentence, the State used a **prior conviction** that was obtained in violation of the United States or Arizona constitutions or Arizona statutes.
- Other rights** guaranteed by the United States or Arizona constitutions were abridged or denied.
- Rule 32.1(b):** The court did not have subject matter **jurisdiction** to render a judgment or to impose a sentence on the defendant.
- Rule 32.1(c):** The **sentence** is not authorized by law.
- Rule 32.1(d):** The defendant continues to be or will continue to be in custody after his or her **sentence expired**.
- Rule 32.1(e):** newly discovered **material facts** probably exist, and those facts probably would have changed the judgment or sentence.

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

- Rule 32.1(f):** the failure to **timely file** a notice of appeal was not the defendant's fault.
- Rule 32.1(g):** There has been significant **change in the law** that, if applicable to the defendant ' s case, would probably overturn the defendant's conviction or sentence.
- Rule 32.1(h):** This petition demonstrates by **clear and convincing evidence** that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.
- Any **other ground** within the scope of Rule 32, Rules of Criminal Procedure (Specify):

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

- Rule 33.1(a):** The defendant's plea or admission to a probation violation was obtained, or the defendant's sentence was imposed, in violation of the United States or Arizona constitutions.
 - The Defendant was denied the constitutional right to representation by a **competent and effective lawyer** at every critical stage of the proceeding.
 - There was a violation of the defendant's right not to be **punished twice** for the same act.
 - Other rights** guaranteed by the United States or Arizona constitutions were abridged or denied.
- Rule 33.1(b):** The court did not have subject matter **jurisdiction** to render a judgment or to impose a sentence on the defendant.
- Rule 33.1(c):** The **sentence** is not authorized by law or by the plea agreement.
- Rule 33.1(d):** the defendant continues to be or will continue to be in custody after his or her **sentence expired**.
- Rule 33.1(e):** newly discovered **material facts** probably exist, and those facts probably would have changed the judgment or sentence.

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

- Rule 33.1(f):** the failure to **timely file** a notice of post-conviction was not the defendant's fault.
- Rule 33.1(g):** There has been a significant **change in the law** that, if applicable to the defendant's case, would probably overturn the defendant's conviction or sentence.
- Rule 33.1(h):** This petition demonstrates by **clear and convincing evidence** that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt.

4. SUPPORTING FACTS AND DOCUMENTS.

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

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

Affidavits [Exhibit(s) # _____]

Transcripts [Exhibit(s) # _____]

Documents [Exhibit(s) # _____]

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

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

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

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

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

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

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

6. RELIEF REQUESTED

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

- A.** Release from custody and discharge.
- B.** A new trial.
- C.** Correction of sentence.
- D.** The right to file a delayed appeal.
- E.** Other relief (specify): _____

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

Date

Defendant

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

Case Number: _____

Defendant

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

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

1. **The Plea Agreement.** The plea agreement contains the correct classification of offenses and the correct sentencing range of each offense. _____
2. **Advising and Questioning the Defendant during the plea colloquy.** *Rules 17.1; 17.2*
 - (a) Defendant was personally present. *Rules 17.1(a)(2)* _____
 - (b) The court explained the nature of the charge for the plea. *Rule 17.2(a)(1)* _____
 - (c) The court explained the range of possible sentences: minimum, maximum, fines, special conditions. *Rule 17.2(a)(2)* _____
 - (d) The court explained the constitutional rights waived by entering a plea. *Rules 17.2(a)(3); 17.3(a)(1)* _____
 - (e) The court informed the defendant of the right to plead not guilty. *Rule 17.2(a)(4)* _____
 - (f) The court explained that the entry of a guilty or not contest plea would result in the waiver of the defendant's right to appeal and that post-conviction relief would be the only available form of review. *Rules 17.1(e); 17.2(a)(5)* _____
 - (g) The court advised the defendant of the immigration consequences of a guilty plea. *Rule 17.2(b)* _____
3. **Voluntariness of Plea.** The court determined the plea was voluntary, not the result of threats, not the result of force, not the result of promises. *Rules 17.1(b); 17.3(a); 17.4(c)* _____
4. **Factual Basis.** The court found a factual basis for the plea. *Rule 17.3(b)* _____
5. **Acceptance of Plea.** The court accepted the plea agreement either at the time of the change of plea or at sentencing, if acceptance was deferred. *Rules 17.4(d); 17.3(b)* _____
6. **Written and Signed.** The plea agreement was in writing and signed by the defendant. *Rule 17.4(b)* _____

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

1. **Disclosure of Reports.** The PSR and any other reports were disclosed to the defendant before sentencing. *Rule 26.6(a)* _____
2. **Opportunity for Objections.** The defendant had the opportunity to raise objections to the PSR. *Rule 26.8(b)* _____

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

- 3. **Rulings and Remedies on Objections.** The court ruled on the defendant's objections and provided remedies where appropriate (e.g. new PSR, excision, sealing). *Rule 26.8(c)* _____
- 4. **Prosecutorial Compliance.** The prosecutor complied with any promises or guarantees made in the plea agreement. *Santobello v. New York*, 404 U.S. 257 (1971). _____
- 5. **Pronouncement of Judgment.** *Rule 26.10(a)* _____
- 6. **Pronouncement of Sentence.** *Rule 26.10(b)*
 - (a) The court gave the defendant an opportunity to address the court. *Rule 26.10(b)(1)*
 - (b) The court considered defendant's time in custody. *Rule 26.10(b)(2)*
 - (c) The court explained the terms of sentence/probation. *Rule 26.10(b)(3)*
 - (d) The court specified the commencement date. *Rule 26.10(b)(4)* _____
- 7. **Reasons for Sentence.** The court set forth its reasons for the sentence. *A.R.S. § 13-701(C)*
 - (a) The court considered any mitigation evidence that was offered _____
 - (b) Any aggravating factors are supported by the record _____
 - (c) If a sentence above the presumptive term was imposed, the court relied on one proven statutory aggravating factor _____
- 8. **Enforcement of Plea.** The court sentenced the defendant pursuant to the plea agreement. *17.4(d), (e), (g)* _____

Form 26. Defendant's Request for the Court Record

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

STATE OF ARIZONA, Plaintiff

[CASE/COMPLAINT NO.]

-vs-

**DEFENDANT'S REQUEST FOR
THE COURT RECORD**

Defendant (FIRST, MI, LAST)

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

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

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

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

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

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

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

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

[] **THE DEFENDANT REQUESTS TRANSCRIPTS OF COURT PROCEEDINGS:**

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

[] Evidentiary hearings.

Specify the subjects of the evidentiary hearings, or indicate "all": _____

[] Trial. If this box is checked, specify whether the Defendant requests transcripts of: (Check all that apply.)

[] Hearings on pretrial motions

[] Jury selection

[] Opening statements

[] Testimony of witnesses

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

- Sentencing, including any presentence hearing
- Rule 11 Hearing
- Other (specify): _____

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

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

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

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

Dated this ____ day of _____, 20__.

 Defendant or Attorney for Defendant

Copy of the foregoing

Mailed this ___ day of _____, 20__ to:

