Rule 32 Task Force

Meeting Agenda

Friday, November 9, 2018
11:30 a.m. to 5:00 p.m.

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

Item no. 1	**Call to Order** **Introductory remarks**	*Hon. Joseph Welty, Chair*
Item no. 2 Page 3	**Approval of the August 31, 2018 meeting minutes**	*Judge Welty*
Item no. 3 Page 9	**Discussion of the November 9 meeting version (Judge Cattani's Rule 32/33 proposal)**	*Judge Cattani* *All*
Item no. 4 Page 53	**Discussion of an alternative Rule 32.1(h) proposal**	*Mr. Steinfeld* *All*
Item no. 5	**Workgroup reports:** **Workgroup 1** **Workgroup 2** **Workgroup 3**	 *Mr. Euchner* *Judge Cattani* *Judge Johnson*
Item no. 6	**Roadmap**	*Judge Welty*
Item no. 7	**Call to the Public** **Adjourn**	*Judge Welty*

The Chairs may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda. Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

Rule 32 Task Force

State Courts Building, Phoenix

Meeting Minutes: August 31, 2018

Members attending: Hon. Joseph Welty (Chair), Timothy Agan, Hon. James Beene, Hon. Kent Cattani, David Euchner, Jennifer Garcia, Hon. Kellie Johnson (by telephone), Jason Kreag, Dan Levey, Michael Mitchell, Hon. Samuel Myers, Hon. James Sampanes, Mikel Steinfeld, Lacey Stover Gard, Hon. Danielle Viola, Hon. Rick Williams

Absent: Hon. Cathleen Brown Nichols, Hon. Peter Eckerstrom, David Rodriquez

Guests: Ellie Hoecker, Tim Geiger, Kathryn Andrews

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

1. **Call to order; introductory remarks; approval of meeting minutes.** The Chair called the third Task Force meeting to order at 10:23 a.m. He commended the members' improvements to Rule 32 at the August 3 meeting, and he encouraged them to continue their efforts. He then directed the members' attention to the August 3 draft meeting minutes. Mr. Euchner requested a modification at page 6 of the draft. He requested to change a sentence that read, "On the other hand, a defense attorney member interpreted the denial of review in *Chavez* as a signal to this Task Force to propose an amendment that addresses this topic." He would change this to, "A defense attorney member acknowledged Judge Cattani's interpretation of the Court's order but stated that the denial of review in *Chavez* could also be interpreted as a signal to this Task Force to propose a rule amendment that addresses this topic." The Chair advised that the minutes will be amended accordingly, and with that, a member made the following motion.

Motion: To approve that August 3, 2018 minutes with Mr. Euchner's modification noted above. The motion received a second and it passed unanimously. **R32TF: 002**

The Chair then requested reports from the workgroups, beginning with Workgroup 3.

2. Workgroup 3. Judge Johnson and Judge Beene presented on behalf of the workgroup.

Change of judge of right. At the August 3 Task Force meeting, Workgroup 3 proposed an amendment to Rule 10.2 that would add a change of judge provision for post-conviction proceedings. After considering comments at that meeting, however, and to make Rule 32 more self-contained, the workgroup was now proposing to add the change of judge provision to Rule 32.4(g) ("assignment of a judge"). After members discussed the proposed draft, the Chair observed that to preserve the timing and other requirements for a change of judge, and to avoid repeating those requirements in Rule 32, it might be preferable to have Rule 32.4(g) cross-reference Rule 10.2. Because Rule 32.3(a) expressly provides that a Rule 32 proceeding "is part of the original criminal action," Judge Welty noted that post-conviction, a party would have the same right to a change of judge under Rule 10.2 as the party had prior to the entry of judgment. Most members agreed with the Chair's observation. After further discussion, members also agreed that the was no need for Rule 10.2(a)(4) to refer to remands for resentencing because the

remand is a continuation of the original case. Rule 10.2(e) will continue to refer to sentencing as a contested proceeding, even though it also may be uncontested. In summary, the members' revisions to Rule 32.4(g) during the meeting would simply provide that the provisions of Rules 10.1 and 10.2 apply to Rule 32 proceedings when the case is assigned to a new judge. The Chair will work with staff to assure deletion of inappropriate text in Rule 10.2.

Competence. During the August 3 Task Force meeting, members declined to add a rule or comment concerning the defendant's competence during a Rule 32 proceeding. However, the Chair invited further proposals to address this issue. Judge Johnson reported that the workgroup had no new proposal to present at today's meeting.

Of-right terminology. Judge Johnson also reported that the workgroup had no new language to substitute for the term "of right" in Rule 32.1. Judge Cattani, however, had a proposal for addressing the issue.

Judge Cattani proposed a new rule, conceptually numbered Rule 33, that would exclusively pertain to post-conviction proceedings for defendants who entered guilty pleas. He envisioned relocating current Rule 33 ("contempt") as either Rule 35 or Rule 36, both of which are currently "reserved." Judge Cattani reasoned that it would be easier for self-represented defendants to understand the process if all the provisions for post-conviction proceedings for pleading defendants were in a single rule, i.e., Rule 33. Furthermore, doing so would allow abrogation of the term "of right," which members and others have found vague and confusing.

Judge Cattani recognized that the creation of his proposed Rule 33 might duplicate many of the applicable provisions of Rule 32, but he believes the benefit of separate rules would outweigh the redundancy. A member inquired whether a defendant who pled guilty to some counts and was convicted on other counts following trial would file for post-conviction relief under Rule 32 or Rule 33. The response was that the defendant would proceed under Rule 32 for the counts on which the defendant was found guilty at trial, and under Rule 33 for the convictions following a plea. There would be straightforward and distinct procedures for each proceeding. Members favored the concept, and Judge Cattani will prepare and present a draft of his proposed revisions at the next meeting. Mr. Euchner requested that Judge Cattani also consider reorganizing the text of Rule 32.4 into more discreet segments; Mr. Euchner characterized the members' current draft, especially with the addition of the *Anders/Chavez* provisions, as a lengthy labyrinth of provisions.

3. **Workgroup 2.** After the August 3 Task Force meeting, Ms. Garcia, Ms. Merrill, Ms. Hoecker, and Mr. Euchner for the defense, and Ms. Gard on behalf of the State, submitted additional materials concerning the death sentence/*Miles* issue under Rule 32.1(h). Judge Cattani suggested that the Task Force's rule petition should present both positions. Judge Welty requested Ms. Garcia to briefly present the defense position. Ms. Garcia advised that the Arizona Supreme Court had three opportunities to consider the issue: first in the original rule petition, R-97-0006; then in a subsequent rule petition filed by the Arizona Attorney General, R-01-0015; and again in *State v. Miles*. On each occasion, the Court either supported the rule or retained its substance. Ms. Garcia noted further that Rule 32.1(h) has a high standard that is difficult to meet, and that on only a handful of occasions have defendants sought relief under the rule. She does

not see a separation of powers issue under the rule. (Mr. Euchner also mentioned a recent Supreme Court opinion, *Twin City Fire Insurance Co. v. Leija* (CV-17-0280 PR, 8/2/2018), in which Justice Bolick wrote a concurring opinion addressing separation of powers.) Ms. Gard responded to Ms. Garcia's comments by asking members not to read too much into *Miles* because the majority opinion in that case resolved the case on an issue other than the propriety of Rule 32.1(h). She also noted Justice Pelander's concurring opinion in *Miles* concerning the vague origin of the Rule 32.1(h) death penalty provision.

At this point Mr. Euchner moved that the Task Force not recommend a position concerning Rule 32.1(h), but rather, that the issue abide the Court's consideration of a future rule petition that he expected the Attorney General to file regarding Rule 32.1(h). The motion received a second, but another member requested to table the motion. One judge member thought taking no position wouldn't be helpful to the Court and asked why the Task Force should not give the Court the benefit of its opinion. Other members disagreed. One member thought the vote would be evenly split and therefore not compelling. Another member suggested that because the Rule 32.1(h) issue was divisive, taking a position on that provision could hinder the members' collaborative approach on other Rule 32 issues. But the Chair observed that Justice Pelander requested this Task Force to review the rule, and the Court is expecting the members' response. He added that although the petition could express the members' different views, the Task Force would be remiss if it did not include the majority's recommendation. Members unanimously agreed to table the motion pending Workgroup 2's further consideration of Rule 32.1(h).

4. **Workgroup 1.** Mr. Euchner presented on behalf of the workgroup.

Preclusion: burden of proof. Mr. Euchner noted that current Rule 32.3(c) ("standard of proof") contains two sentences that some stakeholders consider contradictory. To avoid confusion, the workgroup moved the second sentence ("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") to Rule 32.3(b) ("exceptions"), with the added words "at any time" to allow the court to summarily dismiss precluded claims after the notice is filed or at a later time. The workgroup moved the first sentence of Rule 32.3(c) ("the State must plead and prove any ground of preclusion by a preponderance of the evidence") so it is now the last sentence of Rule 32.6(a) ("State's response"). Judge Cattani proposed eliminating this sentence because whether the State proves preclusion, or the court finds it on its own initiative, the claim is precluded if the evidence establishes preclusion. The workgroup will discuss this point further.

Discovery. Mr. Mitchell did not find a need to include a discovery provision in Rule 32 because he did not think discovery was a significant problem under the current rules — there currently is no discovery provision in Rule 32 —but he acknowledged this was a minority view in the workgroup. Mr. Euchner presented the workgroup's majority view, which was expressed in a proposed new Rule 32.4(h) titled "discovery." The proposed new rule diverges from the leading case, *Canion v. Cole*, which permitted discovery only after the filing of a petition. The workgroup's draft allows discovery earlier, after filing a notice, but only by court order and on a showing of good cause. The draft rule further provides that to show good cause, the moving

party "must identify the claim to which the discovery related and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim."

A judge member believed that the filing of a petition was necessary to provide context for a discovery request, and to sufficiently narrow the request so it did not become a fishing expedition. Another judge member stated his belief that pre-petition discovery would lead to delay in the filing of a petition. The judge believed the rule should follow the ruling in *Canion v. Cole*. But other members discussed why merely a notice should be sufficient to support a discovery request. These members believed that discovery could assist, or even be essential for, the preparation of a petition. They contended that pre-petition discovery helps to identify, and provide a basis for, issues raised in the petition. Additionally, allowing discovery before the petition might expedite the process by avoiding the need to continue a hearing on the petition because of ongoing post-petition discovery. Finally, the court may appoint experts after the notice is filed, but before the defendant files a petition, and pre-petition discovery could obtain information on which the expert could rely. However, if the court can authorize pre-petition discovery, the Chair suggested that Rule 32.4(h) include a more rigorous standard than "good cause;" he suggested "substantial need," which is a Rule 15 standard. The workgroup agreed to take another look at proposed Rule 32.4(h) and consider today's discussion.

Illegal sentences. Ms. Beckmann led the discussion on this issue. She began by noting the troublesome circumstance of a defendant whose sentence exceeds what the trial court intended to impose, or what was permitted by law, but who did not become aware of the discrepancy until the approach of an anticipated release date. Although the defendant might file a Rule 32 petition when becoming aware of the discrepancy, the petition might be dismissed on grounds of preclusion or untimeliness, leaving the defendant with no remedy. *Diaz*, *Goldin*, and *Gonzales* are examples of these cases. Invariably, the defendants in these circumstances must overcome the bars of untimeliness and preclusion.

Workgroup 1 contemplated a change to Rule 32.2(b) ("exceptions") so that claims of sentences "not authorized by law" under Rule 32.1(c) would not be subject to preclusion. On the one hand, the current number of meritorious section (c) claims is relatively small; and if a sentence is truly illegal, the interests of victims and the finality of judgments are not furthered by holding the defendant for longer than the correct sentence. On the other hand, some members believed that unless such claims are precluded, the proposed rule change could lead to large numbers of section (c) claims. Mr. Mitchell suggested that rather than removing section (c) from the effect of preclusion, the State can waive the defense of preclusion on a case-by-case basis and when necessary in the interests of justice. Mr. Euchner advised that the workgroup would study the issue further. Moreover, when it does so, the workgroup also will consider whether it deleted the correct clause of Rule 32.1(c). The workgroup's draft now says, "the sentence imposed ~~exceeds the maximum authorized by law, or~~ is ~~otherwise~~ not in accordance with the sentence authorized by law." Some members believed the stricken language should be retained, and the balance of the provision should be deleted, and the workgroup will reconsider this as well.

Lack of jurisdiction. Ms. Beckmann also presented a memo she prepared with Judge Nichols concerning jurisdiction under Rule 32.1(b). They reviewed pertinent case law and

concluded that the term "jurisdiction" is sometimes used loosely to include personal as well as subject matter jurisdiction. Ms. Beckmann cited the 2010 Supreme Court's opinion in *State v. Maldonado*, which noted that courts and parties had been using the term "jurisdiction" imprecisely and to refer to procedural defects that do not implicate a court's subject matter jurisdiction. Ms. Beckmann indicated that the term jurisdiction in Rule 32.1(b) was most likely intended to refer only to subject matter jurisdiction. The distinction between types of jurisdiction is significant because while personal jurisdiction can be waived, subject matter jurisdiction cannot be waived. Although defendants rarely raise true claims of lack of subject matter jurisdiction, the workgroup believed as a matter of policy that those claims should not be precluded, consistently with the principle that subject matter jurisdiction can be raised at any time. She cited *State v Espinoza*, a 2012 Division Two opinion that relied in part on *Maldonado*. The case presented an example of a procedural tangle that resulted from an initial lack of subject matter jurisdiction and a post-conviction claim long thereafter; had the claim been precluded, it might have never been corrected. The workgroup proposed an amendment to Rule 32.2(b) that would remove lack of jurisdiction from the effect of preclusion. However, the workgroup had concerns that if it exempted the entirety of Rule 32.1(b), it might inadvertently affect claims that should be precluded, i.e., a lack of personal jurisdiction, if that also was included in 32.1(b). A judge member requested an opportunity to further review applicable case law before the members decided on a course of action.

Preclusion: generally. Ms. Beckmann and Mr. Euchner then posed the following issue. Current Rule 32.2(b) exempts from the preclusive effect of Rule 32.2(a) claims that are made under Rule 32.1(d) through (h). Based on the discussion above concerning Rules 32.1(b) and 32.1(c), members might possibly expand the exemption to claims brought under Rules 32.1(b) through 32.1(h). In other words, the only claims that still would be subject to preclusion would be those brought under Rule 32.1(a). While most Rule 32 claims are brought under section (a), the exemptions to preclusion under Rule 32.2(b) would nonetheless overshadow the claims subject to preclusion under Rule 32.2(a). This could necessitate stylistic changes to Rule 32.2, but at the same time, any such changes also would need to accommodate A.R.S. § 13-4232.

Privilege. Mr. Euchner advised that following members' comments during the August 3 Task Force meeting, the workgroup scrapped its proposed amendments to Rule 32.6(a) concerning the defendant's waiver of the attorney-client privilege on an ineffective assistance of counsel claim. The earlier draft would have required an in-court colloquy between the judge and the defendant to obtain a waiver. However, in lieu of the former draft, Workgroup 1 now proposed an amendment to Rule 32.4(d) ("duty of counsel, defendant's pro se petition"). The words "waiver of attorney-client privilege" would be added to the title of Rule 32.4(d). The proposed amendment would provide, "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)." Members agreed with the provision but questioned whether Rule 32.4(d) was the most suitable location. Members then tentatively agreed to relocate the provision as a new, standalone Rule 32.4(f) with the revised title, "attorney-client privilege and confidentiality for the defendant." If members can find a more

appropriate location, they will move it again. They may also break the provision into two numbered subparts.

Transcripts. Judge Myers advised that Ms. Andrews had brought to his attention an issue involving missing transcripts. Rules 31.8(e) and 31.8(f) allow for reconstruction of the record when transcripts are missing on an appeal, but there is no corresponding provision in Rule 32. Ms. Andrews proposed adding a comparable provision in Rule 32.4(e) ("transcript preparation"). Members were in general agreement with her proposal, but because of the length of the Rule 31 provisions, they preferred to add cross-references to those provisions rather than duplicating them entirely in Rule 32.

5. **Roadmap.** The Chair again encouraged members to advise him or staff of any new areas in Rule 32 that the Task Force should study. The Task Force is finishing the initial 18 assigned topics, but members need to start working on any additional issues.

The Chair had contemplated a meeting on Friday, October 12, but several members would be absent then. Another date in October will be selected, but it might not be on a Friday.

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

7. **Adjourn.** The meeting adjourned at 1:54 p.m.

Staff's introduction to the November 9 version of Rule 32

The primary distinction between the version considered at the August 31 Task Force meeting and the November 9 version is that the former consisted of one rule – Rule 32 – and the new version consists of two rules – Rule 32 and Rule 33.

The primary distinction between these two rules is indicated by their respective titles. Rule 32 is titled "post-conviction relief for defendants sentenced following a trial." Under Rule 32.1 ("scope"), this rule also applies in any case in which the defendant was sentenced to death. (See further Rule 32.3(c): "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.") By implication although not expressly stated, Rule 32 would apply to a defendant who was sentenced after a probation violation hearing.

Rule 33 is titled "post-conviction relief for a defendant who pled guilty or who admitted a probation violation." Under Rule 33.1 ("scope"), Rule 33 also applies to a defendant who had an automatic probation violation based on a plea of guilty or no contest. Rule 33 replaces what is currently known as an "of right" petition, and it does so without using the term "of right." Rule 33.1 also expressly states that "to challenge the effectiveness of counsel in the first post-conviction proceeding under this rule, a defendant may file a second notice requesting post-conviction relief."

Rules 33.1 through 33.4 were drafted specifically for Rule 33 petitions. However, starting at Rules 32.5 and 33.5, which deal with the appointment of counsel, and continuing to the end of both rules, Rules 32 and 33 are substantially similar. Accordingly, and at an earlier drafting stage, Rules 32 and 33 concluded with the notice provisions of Rules 32.4 and 33.4, respectively, and procedures after the filing of either notice continued in a new Rule 34 that was intended for use in both Rule 32 and Rule 33 proceedings. New Rule 34 would have included provisions for such things as appointment of counsel, filing a petition, the evidentiary hearing, and appellate review. Ultimately, the drafters decided that Rule 32 and Rule 33 should be standalone rules. This resulted in considerable duplication of provisions common to both rules, but the trade-off is having two separate rules that are each self-contained.

The November 9 meeting draft is not completely formatted. There may be grammatical or syntactical errors in the draft, and a few cross-references may require correction. There are strikethroughs, parentheticals, and comments in bold font, capital letters, or otherwise throughout Rules 32 and 33 that raise noteworthy issues or require further discussion, including Rule 32.1(h) regarding the penalty phase verdict, and matters concerning preclusion.

Judge Cattani is the primary architect of these revisions. He met with Mark a half-dozen times in September and October to meticulously review and revise these rules. Judge Cattani also requested informal input during the late-stages of drafting from a few Task Force members and from a judge who is not on the Task Force. The November 9 meeting draft is the most recent of several drafts. There is no redline version because the succession of drafts made redlines hard to follow and probably of minimal benefit. There are other organizational changes in addition to new Rule 33; for example, lengthy Rule 32.9, now titled "review," has been separated into two rules, one concerning a motion for rehearing and the other concerning a petition or cross-petition for review.

The drafters included in the November 9 draft changes that Task Force members made up through the time of the August 31 Task Force meeting and that Workgroup 1 made thereafter. However, most of the provisions in the Task Force's previous draft, including the comments and the rule on DNA testing, have been modified stylistically or substantively, and a careful reading is recommended.

Rule 32. Post-Conviction Relief for Defendants SENTENCED FOLLOWING A Trial *[November 9, 2018 meeting version]*

Rule 32.1. Scope of Remedy

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

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

Grounds for Relief. Grounds for relief are:

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

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

(c) the sentence imposed exceeds the maximum authorized by law;

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

(e) the existence of newly discovered material facts that probably would have changed the verdict or sentence.

Newly discovered material facts exist if:

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

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

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

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

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

(h) the defendant presents clear and convincing evidence sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt, [or that no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held

pursuant to A.R.S. § 13-752.] [Lacey's suggested edits, derived from *Sawyer v. Whitley*, 505 U.S. 333 (1992), and still open for discussion.]

COMMENT

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

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

Rule 32.l(c). This provision provides a basis to challenge a sentence even though the petitioner does not contest the validity of the underlying conviction.

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

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

Rule 32.2. Preclusion of Remedy

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

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

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

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

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

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

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

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

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

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

COMMENT

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

Rule 32 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq., which provides a remedy for individuals

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

Rule 32.4. Filing a Notice Requesting Post-Conviction Relief

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

(b) Notice Requesting Post-Conviction Relief

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSED COMMENT TO RULE 32.4(a):

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

whether to summarily dismiss the proceeding as untimely or precluded.

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

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

Rule 32.5. Appointment of Counsel.

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

(1) the defendant requests it; and

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

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

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

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

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

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

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

(b) Discovery. After the filing of a notice, the court for good cause may enter an order allowing discovery. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim. [NOTE: The Task Force should consider either revising this by raising the required showing for pre-petition discovery or relocating the provision so discovery is allowed only after filing a petition.]

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

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

(2) the specific materials that counsel reviewed;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(16) the sentence imposed by the court;

(17) issues raised by appellate counsel; and

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

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

(e) Counsel's Duties after Filing a Notice under Section (c). After counsel files a

notice under section (c) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the post-conviction proceeding.

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

PROPOSED COMMENT TO RULE 32.6(c)

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

Rule 32.7. Petition for Post-Conviction Relief

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

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

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

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

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

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

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

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

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

(C) *Time Extensions.* For good cause, the court may grant a capital defendant one 60-day extension in which to file a petition. For good cause and after considering the rights of the victim, the court may grant additional 30-day extensions for good cause.

(D) *Notice of Status.* The defendant must file a notice in the Supreme Court advising the Court of the status of the proceeding if a petition is not filed:

(i) within 12 months after counsel is appointed; or

(ii) if the defendant is proceeding without counsel, within 12 months after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

The defendant must file a status report in the Supreme Court every 60 days thereafter until a petition is filed.

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

(c) Length of Petition.

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

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

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

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

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

Rule 32.8. Transcript Preparation.

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

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

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

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

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

Rule 32.9. Response and Reply; Amendments

(a) State's Response.

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

(2) *Contents.* The State's response must include a memorandum that

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

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

(c) Length of Response and Reply.

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

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

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

Rule 32.10. Assignment of a Judge.

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

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

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

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

(b) Setting a Hearing. If the court does not summarily dismiss the petition, it

must set a status conference or a hearing within 30 days.

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

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

Rule 32.12. Informal Conference

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

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

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

Rule 32.13. Evidentiary Hearing

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

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

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

(d) Decision.

(1) ***Findings and Conclusions.*** The court must make specific findings of

fact and expressly state its conclusions of law relating to each issue presented.

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

(A) the conviction, sentence, or detention;

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

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

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

Rule 32.14. Motion for Rehearing.

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

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

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

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

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

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

Rule 32.15. Notification to the Appellate Court.

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

Rule 32.16. Petition and Cross-Petition for Review.

(a) Time and Place for Filing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) *Waiver.* A party's failure to raise any issue that could be raised in the

petition or cross-petition for review constitutes a waiver of appellate review of that issue.

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

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

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

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

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

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

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

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

(g) Computing and Modifying Appellate Court Deadlines. Except as otherwise provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in

this rule. An appellate court may modify any deadline in accordance with Rule 31.3(e).

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

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

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

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

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

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

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

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

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

notify the defendant, the Attorney General, and the Director of the State Department of Corrections.

Rule 32.18. Review of an Intellectual Disability Determination in Capital Cases.

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

Rule 32.19. Extensions of Time; Victim Notice and Service

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

(b) Manner and Timing of Service or Notice.

(1) *Victim's Choice of the Manner of Service.* The victim may specify in the notice of appearance whether the service of the request should be to the victim or whether it should go to another person, including the prosecutor, and whether service of the notice should be electronic, by telephone, or by regular mail. Service must be made in the manner specified in the victim's notice of appearance or, if no method is specified, by regular mail. If the victim has requested direct notification, the party requesting an extension of time must serve the victim with notice no later than 24 hours after filing the request.

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

(c) Victim's Response. A victim may file a response to the request no later than

10 days after it is served.

(d) **Factors.** In ruling on any request for an extension of time to file a brief, the court must consider the rights of the defendant and the victim to a prompt and final conclusion of the case.

Rule 32.20. Post-Conviction Deoxyribonucleic Acid Testing

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

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

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

(3) that may contain biological evidence.

(b) **Manner of Filing; Response.** The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 32.4(b)(4). The State must respond to the petition no later than 45 days after it is served.

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

(d) **Court Orders.**

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

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

(B) the evidence is still in existence; and

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

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

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

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

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

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

(e) Test Results.

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

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

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

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

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

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

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

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

Rule 33. Post-Conviction Relief for a Defendant Who Pled Guilty or Admitted a Probation Violation *[November 9, 2018 meeting version]*

Rule 33.1. Scope of Remedy

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

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

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

Grounds for Relief. Grounds for relief are:

(a) the defendant's plea or admission to a probation violation was obtained, OR THE SENTENCE WAS IMPOSED, in violation of the United States or Arizona constitutions;

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

(c) the sentence imposed exceeds the maximum authorized by law;

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

(e) the existence of newly discovered material facts that probably would have changed the sentence.

Newly discovered material facts exist if:

(1) the facts were discovered after sentencing;

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

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

(f) the failure to timely file a notice of post-conviction relief was not the defendant's fault;

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

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

COMMENT

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

Rule 33. l(b). This provision provides a basis to challenge the court's subject matter jurisdiction, which is universally recognized as a ground for post-conviction relief.

Rule 33.l(c). This provision provides a basis to challenge a sentence even though the petitioner does not contest the validity of the underlying conviction.

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

Rule 33. l(h). This claim is independent of a claim under Rule 33.1(e) concerning newly discovered evidence. A defendant who establishes a claim of newly discovered evidence need not comply with the requirements of Rule 33.1(h).

Rule 33.2. Preclusion of Remedy

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

(1) waived by pleading guilty;

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

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

(b) Exceptions to Preclusion. A defendant may raise a claim under Rule 33. l(b) through (h) in a successive or untimely post-conviction notice, but the defendant must specifically explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why the defendant did not raise the claim in a previous notice or petition or in a timely manner~~or in a timely manner~~, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

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

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

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

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

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

COMMENT

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

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

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

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

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

(b) Notice Requesting Post-Conviction Relief.

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

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

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

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

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

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

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

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

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

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

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

PROPOSED COMMENT TO RULE 33.4(a):

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

Rule 33.5. Appointment of Counsel.

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

(1) the defendant requests it; and

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

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

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

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

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

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

(b) Discovery. After the filing of a notice, the court for good cause may enter an order allowing discovery. To show good cause, the moving party must identify the claim to which the discovery relates and reasonable grounds to believe that the request, if granted, would lead to the discovery of evidence material to the claim. [STAFF NOTE: Consider either revising this to raise the required showing or relocating the provision so discovery is allowed only after filing a petition.]

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

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

(2) the specific materials that counsel reviewed;

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

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

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

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

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

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

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

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

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

(11) the sentence imposed by the court; and

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

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

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

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

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

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

PROPOSED COMMENT TO RULE 33.6(c)

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

Rule 33.7. Petition for Post-Conviction Relief

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

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

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

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

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

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

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

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

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

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

Rule 33.8. Transcript Preparation.

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

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

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

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

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

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

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

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

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

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

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

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

Rule 33.10. Assignment of a Judge.

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

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

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

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

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

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

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

Rule 33.12. Informal Conference

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

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

Rule 33.13. Evidentiary Hearing

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

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

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

(d) Decision.

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

presented.

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

(A) the conviction, sentence, or detention;

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

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

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

Rule 33.14. Motion for Rehearing.

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

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

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

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

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

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

Rule 33.15 Notification to the Appellate Court.

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

Rule 33.16. Petition and Cross-Petition for Review.

(a) Time and Place for Filing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Manner and Timing of Service or Notice.

(1) *Victim's Choice of the Manner of Service.* The victim may specify in the notice of appearance whether the service of the request should be to the victim or whether it should go to another person, including the prosecutor, and whether service of the notice should be electronic, by telephone, or by

regular mail. Service must be made in the manner specified in the victim's notice of appearance or, if no method is specified, by regular mail. If the victim has requested direct notification, the party requesting an extension of time must serve the victim with notice no later than 24 hours after filing the request.

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

(c) **Victim's Response.** A victim may file a response to the request no later than 10 days after it is served.

(d) **Factors.** In ruling on any request for an extension of time to file a brief, the court must consider the rights of the defendant and the victim to a prompt and final conclusion of the case.

Rule 33.18. Post-Conviction Deoxyribonucleic Acid Testing

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

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

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

(3) that may contain biological evidence.

(b) **Manner of Filing; Response.** The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 33.4(b)(4). The State must respond to the petition no later than 45 days after it is served.

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

(d) **Court Orders.**

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

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

(B) the evidence is still in existence; and

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

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

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

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

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

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

(e) Test Results.

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

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

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

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

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

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

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

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

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

MEMORANDUM

To: Rule 32 Task Force
From: Mikel Steinfeld
Re: Proposed Modification of Rule 32.1(h)
Date: October 8, 2018

The Task Force has been considering whether to adopt a modification to Rule 32.1(h). In looking at subsection (h), and the opinions in *State v. Miles*, 243 Ariz. 511 (2018), an appropriate modification would be as follows:

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

To understand why this modification is appropriate, this memo will look at: 1) the proposal previously submitted by Ms. Gard and the Task Force's discussions on that proposal; 2) Justice Pelander's concurring opinion in *Miles*, in which Justice Pelander opined subsection (h) risked a subjective review standard; and 3) the standard proposed herein, which ensures an objective standard for review.

MS. GARD'S PROPOSAL

As it currently reads, Rule 32.1(h) allows a criminal defendant to file a successive PCR on the grounds that "the death penalty would not have been imposed." Subsection (h) sets the burden at clear and convincing evidence to support the allegation.

Lacey Gard recommended modifying Rule 32.1(h) to the following:

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

Ms. Gard's basis has been *Sawyer v. Whitley*, 505 U.S. 333 (1992). In *Sawyer*, the Supreme Court addressed the proper standard for successive federal habeas petitions, not the proper state standard. *Whitley*, 505 U.S. at 335 ("The issue before the Court is the standard for determining whether a petitioner bringing a successive … federal habeas claim has shown he is 'actually innocent' of the death penalty …."). As a matter of federal law, the Court concluded the defendant "must show by clear and convincing evidence that … no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* at 336.

The Court's declaration of the proper standard for federal habeas review, however, did not restrict states from imposing a different standard.

In *State v. Miles*, 243 Ariz. 511 (2018), the State argued the current rule should be interpreted in accord with *Sawyer*. *Miles*, 243 Ariz. 511, ¶ 9. The Arizona Supreme Court refused to resolve the issue because it decided the matter on different grounds. *Id.* at ¶ 10.

In this Task Force's prior discussions, the Federal Public Defender's Office submitted a memo arguing the Supreme Court's refusal to engage the argument suggests the State's current position is on shaky ground. Additionally, members of this Task Force noted that Justice Pelander's concurring opinion in *Miles* encouraged us to review Rule 32.1(h). *Id.* at ¶ 32 fn.6 (Pelander, J., concurring).

JUSTICE PELANDER'S CONCURRING OPINION IN *MILES*

Notably, Justice Pelander was not concerned with the imposition-of-death versus eligibility-for-death distinction. *See id.* at ¶ ¶ 27-35. Justice Pelander was concerned with the specific wording of subsection (h). *See id.*

Justice Pelander first observed the language of the prior version of subsection (h) allowed relief if a defendant could prove by "clear and convincing evidence that the facts … would be sufficient to establish that no reasonable fact-finder would have found the defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty." *Id.* at ¶ 27 (quoting prior version of Ariz.R.Crim.P. 32.1(h)). Justice Pelander found this language "perplexing" because the rule's text made application impractical and required speculation. *Id.* at ¶ 30. "As applied here, Rule 32.1(h) on its face compelled the PCR court, a judge who was not involved in the underlying trial or sentencing process, to speculate as to the decision that the trial court (a different,

and now deceased, judge) would have made decades earlier, and to embrace that speculation on a clear-and-convincing standard." *Id.*

Justice Pelander's concern was not that subsection (h) authorized relief in a manner inconsistent with *Sawyer*; Justice Pelander's concern was that subsection (h) created a subjective review standard.

This concern was crystallized when Justice Pelander discussed the more recent version of subsection (h), which changed the focus from the "court" to a "reasonable fact-finder." *Id.* at ¶ 32. "This new version might be read to impose a more objective, workable standard of review that requires the PCR court to determine whether any reasonable fact-finder would have imposed the death penalty, rather than whether a specific individual would have done so in the past." *Id.* at ¶ 32.

While the majority rejected Justice Pelander's interpretation and found the better reading of "court" to mean "a reasonable sentencer, whether a judge or a jury," *id.* at ¶ 11, we can modify subsection (h) to address Justice Pelander's concerns and conform with the majority's interpretation.

PROPOSED MODIFICATION TO SOLIDIFY OBJECTIVE STANDARD

Thus far our discussions have focused on an all-or-nothing consideration of Ms. Gard's proposal. While Justice Pelander had concerns regarding the subjective

standard created by the former version of subsection (h), neither he nor the majority ever expressed concern with the core concept of subsection (h).

As a result, we can modify subsection (h) to address Justice Pelander's concerns and create an objective standard without throwing out part of the substance of the rule:

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

First, this modification adopts Ms. Gard's addition of the "of the offense" language in the guilt aspect. Second, this modification clarifies the standard is an objective one by reiterating the "no reasonable fact-finder" language. The change also modifies the last clause to active voice. This modification does not, however, condition relief solely upon ineligibility for the death penalty.

This modification also keeps in place an important interplay between subsections (e) and (h). Subsection 32.1(e) provides:

> **(e)** newly discovered material facts probably exist and those facts probably would have changed the verdict or sentence.
> Newly discovered material facts exist if:
> (1) the facts were discovered after the trial or sentencing;
> (2) the defendant exercised due diligence in discovering these facts; and
> (3) the newly discovered facts are material and not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony that was of critical significance

> such that the evidence probably would have changed the verdict or sentence.

The Supreme Court has interpreted this section as setting forth five requirements:

> (1) the evidence must appear on its face to have existed at the time of trial but be discovered after trial;
> (2) the motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention;
> (3) the evidence must not simply be cumulative or impeaching;
> (4) the evidence must be relevant to the case;
> (5) the evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

State v. Bilke, 162 Ariz. 51, 52-53 (1989).

Thus, there is an interplay between subsections (e) and (h) when it regards the death sentence. When the defendant is able to satisfy the more stringent requirements of subsection (e), the defendant's claim is subject to a lesser burden: "the evidence probably would have changed the … sentence" or "would likely have altered the … sentence." But when the defendant is unable to satisfy these more stringent requirements, subsection (h) allows relief only if the defendant can prove by "clear and convincing evidence" that "the death penalty would not have been imposed."

The modification proposed herein maintains that balance while clarifying the standard is an objective one.

CONCLUSION

The standard proposed herein addresses Justice Pelander's concern. It ensures any review is objective by focusing on a "reasonable fact-finder." But it doesn't limit relief to circumstances only when the defendant can prove ineligibility for the death penalty. In doing so, the proposed modification maintains the balance between subsections (e) and (h) when a death sentence is involved.

Rule 32. Post-Conviction Relief {August 31, 2018 meeting version w/subsequent workgroup 1 revisions}

Rule 32.1. Scope of Remedy

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

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

Grounds for Relief. Grounds for relief are:

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

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

(c) the sentence imposed is not in accordance with the sentence authorized by law;

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

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

Newly discovered material facts exist if:

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

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

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

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

(g) there has been a significant change in the law that, if applicable to the

defendant's case, would probably overturn the defendant's conviction or sentence; or

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

COMMENT

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

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

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

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

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

Rule 32.2. Preclusion of Remedy

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

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

under Rule 24;

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

(3) waived at trial or on appeal, and not raised in any previous collateral proceeding, except when the claim raises a right of sufficient constitutional magnitude that it requires a knowing, intelligent, and voluntary waiver made personally by the defendant.

(b) Exceptions. Rule 32.2(a) does not apply to claims for relief based on Rule 32.1(b) through (h). A claim under Rule 32. l(b) through (h) that defendant raises in a successive or untimely post-conviction notice must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why defendant did not raise the claim in a previous petition or in a timely manner, the court may summarily dismiss the notice. At any time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

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

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

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

COMMENT

This rule provides that all Rule 32 proceedings are to be treated as criminal actions. The characterization of the proceeding as criminal assures

compensation for appointed counsel and the applicability of criminal standards for admissibility of evidence at an evidentiary hearing except as otherwise provided.

~~Rule 32 does not require that courts "determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition," but courts retain the discretion to order a competency evaluation "if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, [the petition]." *See Fitzgerald v. Myers*, 243 Ariz. 84 (2017).~~

Rule 32 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq. (statutes governing habeas corpus). The rule is intended to provide a standard procedure for accomplishing the objectives of all constitutional, statutory, or common law post-trial writs and remedies except a writ of habeas corpus.

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

(a) Notice of Post-Conviction Relief.

(1) ***Filing.*** A defendant starts a post-conviction proceeding by filing a notice of post-conviction relief in the court where the defendant was convicted. The court must make "notice" forms available for defendants' use.

(2) Time for Filing.

(A) *Generally.* In filing a notice, a defendant must follow the deadlines set forth in this rule. These deadlines do not apply to claims under Rule 32. l(d) through (h).

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

(C) *Time for Filing a Notice in an Of-Right Proceeding.* In a Rule 32 of-right proceeding, a defendant must file the notice no later than 90 days after the oral pronouncement of sentence. A defendant may raise a claim of ineffective assistance of Rule 32 counsel in a successive Rule 32 notice if it is filed no later than 30 days after the final order or mandate in the defendant's of-right petition for post-conviction relief.

(D) *Time for Filing a Notice in Other Noncapital Cases.* In all other noncapital cases, a defendant must file a notice no later than 90 days after the oral pronouncement of sentence or no later than 30 days after the issuance of the order and mandate in the direct appeal, whichever is later. [Lacey's suggested edits.]

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

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

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

(A) *Generally.* Upon receiving a notice from a defendant or the Supreme Court, the superior court clerk must file it in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, defense counsel, the prosecuting attorney's office, and the Attorney General. If the conviction occurred in a limited jurisdiction court, the clerk for the limited jurisdiction court must send a copy of the notice to the prosecuting attorney who represented the State at trial, and to a defense counsel or a defendant, if self-represented. In either court, the clerk must note in the record the date and manner of sending copies of the notice.

(B) *Notice to an Appellate Court.* If an appeal of the defendant's conviction or sentence is pending, the clerk must send a copy of the notice of post-conviction relief to the appropriate appellate court within 5 days of its filing and must note in the record the date and manner of sending the copy. The clerk also must send a copy of any final ruling in the post-conviction proceeding to the appropriate appellate court, as provided in Rule 32.9(c).

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

(b) Appointment of Counsel.

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

(2) ***Noncapital Cases.*** No later than 15 days after the filing of a notice of a defendant's timely or first Rule 32 proceeding, the presiding judge must appoint counsel for the defendant if: (A) the defendant requests it; and **(B)** the judge has previously determined that the defendant is indigent or the defendant has completed an affidavit of indigency. Upon the filing of all other notices in a noncapital case, the presiding judge may appoint counsel for an indigent defendant if requested.

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

(c) Time for Filing a Petition for Post-Conviction Relief.

(1) Capital Cases.

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

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

(C) *Time Extensions.* For good cause, the court may grant a capital

defendant one 60-day extension in which to file a petition. For good cause and after considering the rights of the victim, the court may grant additional 30-day extensions for good cause.

(D) *Notice of Status.* The defendant must file a notice in the Supreme Court advising the Court of the status of the proceeding if a petition is not filed:

(i) within 12 months after counsel is appointed; or

(ii) if the defendant is proceeding without counsel, within 12 months after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

The defendant must file a status report in the Supreme Court every 60 days until a petition is filed.

(2) Noncapital Cases.

(A) *Filing Deadline.* In a noncapital case, appointed counsel must file a petition no later than 60 days after the date of appointment. A defendant without counsel must file a petition no later than 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

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

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

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

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

(B) the specific materials that counsel reviewed;

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

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

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

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

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

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

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

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

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

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

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

(H) the sentence imposed by the court; and

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

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

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

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

indictment;

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

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

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

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

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

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

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

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

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

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

(L) the sentence imposed by the court;

(M) issues raised by appellate counsel; and

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

(4) *Defendant's Pro Se Petition.* Upon receipt of counsel's notice under subpart (d)(1), the defendant may file a petition on his or her own behalf, and the court may extend the time for defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

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

notice under subpart (d)(1) and unless the court orders otherwise, counsel's role is limited to acting as advisory counsel until the trial court's final determination in the Rule 32 proceeding.

(e)-(g) [No change]

Sources for additions:

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

(e)Transcript Preparation.

(1) ***Requests for Transcripts.*** If the trial court proceedings were not transcribed, the defendant may request that certified transcripts be prepared. The court or clerk must provide a form for the defendant to make this request. If a transcript is unavailable, the parties may proceed in accordance with Rule 31.8(e) or Rule 31.8(f).

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

(3) ***Deadline.*** Certified transcripts must be prepared and filed no later than 60 days after the entry of the order granting the request.

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

(5) ***Extending the Deadline for Filing a Petition.*** If a defendant requests the preparation of certified transcripts, the defendant's deadline for filing a petition under (c) is extended by the time between the request and either the transcripts' final preparation or the court's denial of the request.

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

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

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

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

COMMENT

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

Proposed comment to Rule 32.4(d)(2)

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

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

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

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

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

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

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

Rule 32.6. Response and Reply; Amendments; Review

(a)State's Response.

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

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

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

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

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

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

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

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

(d) Review and Further Proceedings.

~~(1)~~ ***Summary Disposition.*** If, after identifying all precluded and untimely claims, the court determines that no remaining claim presents a material issue of fact or law that would entitle the defendant to relief under this rule, the court must summarily dismiss the petition.

~~(2)~~ ***Setting a Hearing.*** If the court does not summarily dismiss the petition, it must set a status conference or hearing within 30 days on those claims that present a material issue of fact. The court also may set a hearing on those claims that present only a material issue of law.

~~(3)~~ ***Notice to Victim.*** If a hearing is ordered, the State must notify any victim of the time and place of the hearing if the victim has requested such notice under a statute or court rule relating to victims' rights.

Rule 32.7. Informal Conference

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

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

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

Rule 32.8. Evidentiary Hearing

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

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

testify.

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

(d) Decision.

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

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

(A) the conviction, sentence, or detention;

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

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

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

Rule 32.9. Review

(a) Filing of a Motion for Rehearing.

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

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

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

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

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

(d) Petition and Cross-Petition for Review.

(1) *Time and Place for Filing.*

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

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

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

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

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

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

the filing of the delayed petition or cross-petition for review and the party may file a delayed petition or cross-petition for review on or before that date.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Service of the reply shall be in accordance with (d)(5) and any extensions of the time for filing the reply may be requested in the appellate court pursuant to (d)(6)(A).

(7) *Modifying Deadlines.* Except as otherwise provided herein, Rule 31.3(d) governs the computation of any appellate court deadline in this rule, and an appellate court may modify any deadline in accordance with Rule 31.3(e).

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

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

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

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

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

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

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

Rule 32.10. Review of an Intellectual Disability Determination in Capital Cases No later than 10 days after the trial court makes a finding on intellectual

disability, the State or the defendant may file with the Court of Appeals a petition for special action challenging the finding. The Rules of Procedure for Special Actions govern the special action, except the Court of Appeals must accept jurisdiction and decide any issue raised.

Rule 32.11. Extensions of Time; Victim Notice and Service

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

(b) Manner and Timing of Service or Notice.

(1) *Victim's Choice of the Manner of Service.* The victim may specify in the notice of appearance whether the service of the request should be to the victim or whether it should go to another person, including the prosecutor, and whether service of the notice should be electronic, by telephone, or by regular mail. Service must be made in the manner specified in the victim's notice of appearance or, if no method is specified, by regular mail. If the victim has requested direct notification, the party requesting an extension of time must serve the victim with notice no later than 24 hours after filing the request.

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

(c) Victim's Response. A victim may file a response to the request no later than 10 days after it is served.

(d) Factors. In ruling on any request for an extension of time to file a brief, the court must consider the rights of the defendant and the victim to a prompt and final conclusion of the case.

Rule 32.12. Post-Conviction Deoxyribonucleic Acid Testing

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

(DNA) testing of any evidence:

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

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

(3) that may contain biological evidence.

(b) Manner of Filing; Response. The defendant must file the petition under the same criminal cause number as the felony conviction, and the clerk must distribute it in the manner provided in Rule 32.4(a)(4). The State must respond to the petition no later than 45 days after it is served.

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

(d) Court Orders.

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

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

(B) the evidence is still in existence; and

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

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

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

(B) DNA testing will produce exculpatory evidence.

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

require the defendant to pay the costs of testing.

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

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

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

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

(e) Test Results.

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

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

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

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

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

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

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

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