

APPENDIX 1

Rule 32.1. Scope of remedy

Subject to limitations of rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief.

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

Grounds for relief are:

- a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;
- b. The court was without jurisdiction to render judgment or to impose sentence;
- c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
- d. The person is being held in custody after the sentence imposed has expired;
- e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:
 - (1) The newly discovered material facts were discovered after the trial.
 - (2) The defendant exercised due diligence in securing the newly discovered material facts.
 - (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.
- f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part; or
- g. There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; or
- h. The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

Rule 32.2. Preclusion of remedy

- a. Preclusion.** A defendant shall be precluded from relief under this rule based upon any ground:
 - (1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
 - (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
 - (3) That has been waived at trial, on appeal, or in any previous collateral proceeding.
- b. Exceptions.** Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear

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

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

Rule 32.3. Nature of proceeding and relation to other remedies

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

Rule 32.4. Commencement of proceedings

a. Form, Filing and Service of Petition. A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred. The court shall provide notice forms for commencement of all post-conviction relief proceedings. In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later. In cases originating at a limited jurisdiction court, the notice must be filed within sixty days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later. In a capital case, the clerk of the Supreme Court shall expeditiously file a notice for post-conviction relief with the trial court upon the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal. Any notice not timely filed may only raise claims pursuant to Rules 32.1(d), (e), (f), (g) and (h). The notice shall bear the caption of the original criminal action or actions to which it pertains. On receipt of the notice, the court shall file a copy of the notice in the case file of each such original action and promptly send copies to the defendant, the county attorney, the defendant's attorney, if known, and the attorney general or the prosecutor, noting in the record the date and manner of sending the copies. If the conviction occurred in a court other than the Superior Court, the copy shall be sent to the office of the prosecuting attorney who represented the state at trial. The state shall notify any victim who has requested notice of post-conviction proceedings.

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

c. Appointment of Counsel.

(1) *Capital Cases.* After the Supreme Court has affirmed a defendant's conviction and sentence in a capital case, the Supreme Court, or if authorized by the Supreme Court, the presiding judge

of the county from which the case originated, shall appoint counsel for the defendant pursuant to A.R.S. § 13-4041 and Rule 6.8 if the defendant is determined to be indigent. If the appointment is made by the presiding judge, a copy of the court's order appointing counsel shall be filed in the Supreme Court.

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

On the first notice in capital cases, appointed counsel for the defendant shall have 12 months from the filing of the notice to file a petition raising claims under Rule 32.1. A capital defendant proceeding without counsel shall have 12 months from the filing of the notice to file a petition. On the filing of a successive notice, appointed counsel, or the defendant if proceeding without counsel, shall file the petition within thirty days from the filing of the notice. On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. Additional extensions of thirty days may be granted for good cause. If a petition for post-conviction relief is not filed within 12 months from the date of appointment of counsel, or 12 months from the date the notice is filed, or the date a request for counsel is denied if the defendant is proceeding without counsel, the defendant or counsel for the defendant shall file a notice in the Supreme Court, advising the court of the status of the proceedings. Thereafter, defendant or counsel for the defendant shall file status reports in the Supreme Court every sixty days until the petition for post-conviction relief is filed.

(2) *Rule 32 of-right and non-capital cases.* Upon the filing of a timely or first notice in a Rule 32 proceeding, the presiding judge, or his or her designee, shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel is within the discretion of the presiding judge. In cases originating at a limited jurisdiction court, counsel shall be appointed in conformity with the aforementioned timeliness distinctions after finding the defendant was originally entitled to counsel based on the offense or potential sentence. Counsel may always be appointed in the interest of justice. In non-capital cases appointed counsel for the defendant shall have sixty days from the date of appointment to file a petition raising claims under Rule 32.1. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition. Additional extensions of thirty days shall be granted only upon a showing of extraordinary circumstances.

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

A defendant proceeding without counsel shall have sixty days to file a petition from the date the notice is filed or from the date the request for counsel is denied.

d. Transcript Preparation. If the trial court proceedings have not been previously transcribed, the defendant may request on a form provided by the clerk of court that certified transcripts be prepared. The court shall expeditiously review the request and order only those transcripts prepared that it deems necessary to resolve the issues to be raised in the petition. In cases originating at a limited jurisdiction court, the use of audio, video, or digital record for

proceedings less than 60 minutes is permissible, unless the local rules dictate otherwise. The preparation of the transcripts shall be at county expense if the defendant is indigent. The time for filing the petition shall be tolled from the time a request for the transcripts is made until the transcripts are prepared or the request is denied. Certified transcripts shall be prepared and filed within sixty days of the order granting the request.

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

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

Rule 32.5. Contents of petition

The petition shall be accompanied by a declaration by the defendant stating under penalty of perjury that the information contained is true to the best of the defendant's knowledge and belief. Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact. Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required. In Rule 32 of-right and non-capital cases, the petition shall not exceed 25 pages. The response shall not exceed 25 pages, and any reply shall not exceed 10 pages. In capital cases, the petition shall not exceed 40 pages. The response shall not exceed 40 pages, and any reply shall not exceed 20 pages. In cases originating at a limited jurisdiction court, the petition shall not exceed 18 pages. The Response shall not exceed 18 pages.

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

Rule 32.6. Additional pleadings; summary disposition; amendments

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

b. Defendant's Reply. Within fifteen days after receipt of the response, the defendant may file a reply. Extensions shall be granted only upon a showing of extraordinary circumstances. In cases originating at a limited jurisdiction court, no reply shall be permitted.

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

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

Rule 32.7. Informal conference

The court may at any time hold an informal conference to expedite the proceeding. In a capital case, the court shall hold an informal conference within 90 days after the appointment of counsel on the first notice of a petition for post-conviction relief. The defendant need not be present if the defendant is represented by counsel who is present.

Rule 32.8. Evidentiary hearing

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

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

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

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

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

Rule 32.9. Review

a. Motion for Rehearing; Response; Reply. Any party aggrieved by a final decision of the trial court in these proceedings may, within fifteen days after the ruling of the court, move the court for a rehearing setting forth in detail the grounds wherein it is believed the court erred. No

response to a motion for rehearing will be filed unless requested by the court, but a motion for rehearing will not be granted in the absence of such a response. A reply, if any, shall be filed within 10 days after the service of the response. The filing of a motion for rehearing in the trial court is not a prerequisite to the filing of a petition for review pursuant to paragraph (c) of this rule. No reply shall be permitted in cases originating at a limited jurisdiction court.

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

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

1. *Form and contents.* The petition or cross-petition for review shall comply with the form requirements of Rule 31.12 of these rules and contain a caption setting forth the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number and a brief descriptive title. An original and seven copies of the petition and an original and one copy of the appendix, if any, shall be filed if review is being sought in the Supreme Court. An original and four copies of the petition and an original and one copy of the appendix, if any, shall be filed if review is being sought in the Court of Appeals. An original and one copy shall be filed if review is being sought in the superior court. The parties shall be designated as in the trial court proceedings. The petition or cross-petition shall not exceed 20 pages, exclusive of the appendix, shall not have a cover or be bound, but shall be fastened with a single staple in the upper left corner, and shall contain the following:

- (i) Copies of the trial court's rulings entered pursuant to rules 32.6(c), 32.8(d) and 32.9(b).
- (ii) The issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review.
- (iii) The facts material to a consideration of the issues presented for review.
- (iv) The reasons why the petition should be granted. In capital cases all references to the record in the trial court shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices. If the appendices exclusive of the trial court's rulings exceed 15 pages in length, such

appendices shall be fastened together separately from the petition and the copies of the trial court's rulings.

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

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

2. *Service; Response; Reply.* The petitioner or cross-petitioner shall serve a copy of the petition or cross-petition on the adverse party. A response may be filed within 30 days from the date upon which the petition or cross-petition is served. The response shall comply with the form requirements of Rule 32.9(c)(1) and shall not exceed 20 pages, exclusive of any appendix. Appendices shall conform to the requirements of Rule 32.9(c)(1). A reply, if any, may be filed within 10 days after the service of a response. The reply shall also comply with the form requirements of Rule 32.9(c)(1). The reply shall be limited to matters addressed in the response and shall not exceed 10 pages. No appendices shall be submitted with a reply.

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

e. Filing of the Record. In Rule 32 of-right and non-capital cases, within 45 days after the receipt of the notice of filing of a petition for review, the record, including the trial court file and the certified transcript, shall be transmitted to the appellate court.

In capital cases, the record of the post-conviction proceedings shall not be transmitted to the appellate court unless requested by that court. If requested by the appellate court, the record shall consist of copies of the notice of post-conviction relief, the petition for post-conviction relief, response and reply, all motions and responsive pleadings filed and all minute entries and orders issued in the post-conviction proceedings, plus the certified transcript and any exhibits admitted by the trial court in the post-conviction proceedings.

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

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

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

Rule 32.10. Review of intellectual disability determination

Within ten days after the trial court makes a finding on intellectual disability, the state or defendant may file a petition for special action with the court of appeals. The filing of the

petition for special action is governed by the rules of procedure for special actions, except that the court of appeals shall exercise jurisdiction and decide the issue raised.

Rule 32.11. Extensions of time; notification of victims

In any capital case, if the victim has filed a notice of appearance as specified in A.R.S. § 31-4234-01, a party seeking an extension of time to file a brief must provide notice of the request to the victim. Notice shall be provided through the prosecutor's office handling the post-conviction relief proceeding, unless the victim specifies a different method in the notice of appearance. The victim may specify in the notice of appearance whether notification should be served directly on the victim or on another person, including the prosecutor, and whether service may be made electronically, by telephone, or by regular mail. If the victim has requested direct notification, the party seeking an extension of time shall serve notice on the victim within 24 hours of filing the extension request. If the prosecutor has the duty to notify the victim on behalf of the defendant, the prosecutor shall serve notice within 24 hours of receipt of the extension request. Service shall be made in the manner specified in the notice of appearance, or if no method is specified, by regular mail. In ruling on any request for an extension of a time limit set in this rule, the court shall consider the rights of the defendant and any victim to prompt and final conclusion of the case.

Rule 32.12. Post-conviction deoxyribonucleic acid testing

- a. Any person who has been convicted and sentenced for a felony offense may petition the court at any time for the forensic deoxyribonucleic acid (DNA) testing of any evidence that is in the possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence.
- b. The petition shall be filed under the same criminal cause number as the felony conviction. Service of petitions filed under this rule shall be governed by Rule 32.4. The state shall have 45 days from date of service to respond to any petition. The court may appoint counsel for an indigent petitioner at any time during any proceedings under this rule.
- c. Upon consideration of the petition and the state's response, the court shall order DNA testing if the court finds that all of the following apply:
 1. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing.
 2. The evidence is still in existence and is in a condition that allows DNA testing to be conducted.
 3. The evidence was not previously subjected to DNA testing or was not subjected to the DNA testing that is now requested and that may resolve an issue not resolved by the previous DNA testing.

If the court orders testing pursuant to this section, the court shall select a laboratory that meets the standards of the DNA advisory board to conduct the testing and shall order the method and responsibility for payment as necessary.

- d. Upon consideration of the petition and the state's response, the court may order DNA testing if the court finds that all of the following apply:
 1. A reasonable probability exists that either:
 - i. The petitioner'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

- ii. DNA testing will produce exculpatory evidence.
- 2. The evidence is still in existence and is in a condition that allows DNA testing to be conducted.
- 3. The evidence was not previously subjected to DNA testing or was not subjected to the DNA testing that is now requested and that may resolve an issue not resolved by the previous DNA testing.

If the court orders testing pursuant to this section, the court shall select a laboratory that meets the standards of the DNA advisory board to conduct the testing and the court may require the petitioner to pay the costs of testing.

e. If the prosecutor or defense counsel has previously subjected evidence to DNA testing, the court may order the prosecutor or defense counsel to provide all the parties and the court with access to the laboratory reports that were prepared in connection with the testing, including underlying data and laboratory notes. If the court orders DNA testing pursuant to this rule, the court shall order the production of any laboratory reports that are prepared in connection with the testing and may order the production of any underlying data and laboratory notes.

f. If a petition is filed pursuant to this rule, the court shall 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 shall prepare an inventory of the evidence and shall submit a copy of the inventory to the defense 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. The court may make any other orders that the court deems appropriate, including designating any of the following:

- 1. The type of DNA analysis to be used.
- 2. The procedures to be followed during the testing.
- 3. The preservation of some of the sample for replicating the testing.
- 4. Elimination samples from third parties.

h. If the results of the post-conviction DNA testing are not favorable to the petitioner, the court shall dismiss any DNA-related claims under Rule 32.1 without any hearing. The court may make further orders as it deems appropriate, including any of the following:

- 1. Notifying the board of executive clemency or a probation department.
- 2. Requesting that the petitioner's sample be added to the federal combined DNA index system offender database.
- 3. Providing notification to the victim or family of the victim.

i. Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of the post-conviction DNA testing are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to statute or the Arizona rules of criminal procedure. If there are no material issues of fact, the hearing required under this subsection need not be an evidentiary hearing, but it must give the parties the opportunity to argue why the petitioner should or should not be entitled to relief under Rule 32.1 as a matter of law.