

APPENDIX 2

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IN THE SUPREME COURT
 OF THE STATE OF ARIZONA

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PETITION TO AMEND
 RULE 32, ARIZONA
 RULES OF CRIMINAL
 PROCEDURE

No. _____

The co-chairmen of the Joint Legislative and Judicial Study Committee on Post-Conviction Relief hereby petition this Court pursuant to Rule 28, Arizona Supreme Court Rules, to amend Rule 32, Arizona Rules of Criminal Procedure, as set forth in the attached Memorandum.

DATED this *29th* day of January, 1992.

Respectfully submitted,

[Signature of Paul J. McMurdie]

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MEMORANDUM

1 On July 31, 1991, this Court, in consultation with
2 legislative leadership, appointed a Post-Conviction Relief
3 Study Committee with a membership virtually identical to the
4 membership of a legislative committee appointed pursuant to
5 House Bill 2412.¹ This committee was charged with making
6 recommendations regarding changes in rules concerning
7 post-conviction relief to implement the "prompt and final"
8 provision of the Victim's Bill of Rights.

9 On December 17, 1991, this 17-member committee completed
10 its work and, with one member dissenting on most provisions,
11 recommended the changes in post-conviction relief procedures
12 reflected in the following proposed amendments to Rule 32,
13 Arizona Rules of Criminal Procedure. The co-chairmen of the
14

15 1. The Committee was composed of the following members:

16 Senator Charles Blanchard
17 Senator John Greene
18 Representative Patti Noland
19 Representative Catherine Eden
20 Judge Noel Fidel, Arizona Court of Appeals, Division One
21 Judge Ronald Reinstein, Maricopa County Superior Court
22 Judge James Sult, Yavapai County Superior Court
23 Chick Hastings, Yavapai County Attorney
24 Paul McMurdie, Chief Counsel Criminal Appeals, Arizona
25 Attorney General
26 Jessica Funkhouser, Chief Counsel Appellate Division,
 Maricopa County Attorney
 Charles Krull, Deputy Public Defender, Maricopa County
 Allen Gerhardt, Pinal County Public Defender
 Bruce Griffen, Attorney
 Denise Young, Director Capital Representation Project
 Natacha Wagner, Executive Director Crime Victim Foundation
 Karen Duffy, Victims' Representative
 Nancy Koger, Victims' Representative

1 committee submit the recommended changes pursuant to Rule 28,
2 Rules of the Supreme Court. The reasons for adoption of the
3 changes are noted after the individual rule changes. The
4 reasons are the comments of the chairmen, not the committee
5 and are not submitted as comments to the rules themselves.
6 The text of the additions are capitalized, the deletions are
7 indicated by ~~XXXXXXXXXX~~.

8 RULE 32.1 SCOPE OF REMEDY

9 Subject to the limitations of Rule 32.2, any person who
10 has been convicted of, or sentenced for, a criminal offense
11 may, without payment of any fee, institute a proceeding to
12 secure appropriate relief ~~ON THE GROUND OF GROUNDS THAT~~

13 ON ANY OF THE FOLLOWING GROUNDS:

- 14 a. The conviction or the sentence was in violation of
15 the Constitution of the United States or of the State of
16 Arizona;
- 17 b. The court was without jurisdiction to render judgment
18 or to impose sentence;
- 19 c. The sentence imposed exceeded the maximum authorized
20 by law, or is otherwise not in accordance with the sentence
21 authorized by law;
- 22 d. ~~HE~~ THE PERSON is being held in custody after
23 ~~HIS~~ THE sentence IMPOSED has expired;
- 24 e. ~~Newly discovered material facts exist, which the~~
25 ~~court, after considering~~

1 (X) // THE PROBABILITY THAT SUCH FACTS, IF INTRODUCED
2 WOULD HAVE CHANGED THE VERDICT, FINDING OR SENTENCE,

3 (Y) // THE DILIGENCE WHICH WOULD HAVE BEEN REQUIRED TO
4 DISCOVER AND PRODUCE THE EVIDENCE AT TRIAL,

5 (Z) // THE PROMPTNESS WITH WHICH THE PETITIONER HAS
6 COMMENCED A PROCEEDING AFTER DISCOVERY OF SUCH FACTS,
7 MAY REQUIRE THAT THE CONVICTION OR SENTENCE BE RECALLED,

8 THE DEFENDANT DEMONSTRATES THAT NEWLY DISCOVERED
9 MATERIAL FACTS PROBABLY EXIST AND THAT SUCH FACTS PROBABLY
10 WOULD HAVE CHANGED THE VERDICT OR SENTENCE. THE DEFENDANT
11 SHOWS NEWLY DISCOVERED MATERIAL FACTS IF:

12 (1) THE NEWLY DISCOVERED MATERIAL FACTS WERE DISCOVERED
13 AFTER THE TRIAL.

14 (2) THE DEFENDANT EXERCISED DUE DILIGENCE IN SECURING
15 THE NEWLY DISCOVERED MATERIAL FACTS.

16 (3) THE NEWLY DISCOVERED MATERIAL FACTS ARE NOT
17 CUMULATIVE OR USED SOLELY FOR IMPEACHMENT.

18 f. The petitioner's DEFENDANT'S failure to appeal
19 from the judgment, sentence, or both within the prescribed
20 time was without fault on his THE DEFENDANT'S part; or

21 g. There has been a significant change in the law
22 applied in the process which led to the petitioner's
23 conviction or sentence, and there are sufficient reasons to
24 allow retroactive application of the changed legal
25 standard.

1 THERE HAS BEEN A SIGNIFICANT CHANGE IN THE LAW THAT IF
2 DETERMINED TO APPLY RETROACTIVELY WOULD PROBABLY OVERTURN THE
3 DEFENDANT'S CONVICTION OR SENTENCE.

4 Reasons for Amending the Rule:

5 There are two substantive changes to Rule 32.1. The
6 first, is the change to subsection (e). The change is
7 intended to codify this Court's case law regarding newly
8 discovered evidence. The change reflects that the defendant
9 must demonstrate by a preponderance of the evidence that he
10 has recently discovered material facts, and that these newly
11 discovered facts probably would have changed the verdict or
12 sentence. The newly discovered material facts must have been
13 discovered after the trial, and discovered with due
14 diligence. The newly discovered material facts must not be
15 cumulative or used solely for impeachment.

16 The change to subsection (g) reflects that when there has
17 been a "change in the law" a court must first determine
18 whether the change should apply retroactively to the
19 defendant who is petitioning for relief. See State v.
20 Slemmer, 102 Ariz. Adv. Rep. 11 (Dec. 19, 1991). The study
21 committee recognized that some changes in the law would be
22 deemed appropriate to apply retroactively while other changes
23 would not. Once a court determines whether the change in the
24 law is to apply retroactively, the court must then determine
25 whether the retroactive application would probably overturn
26 the defendant's conviction or sentence.

1 The committee recognized that the trial courts had not
2 uniformly applied the previous subsections of (e) and (g).
3 In an attempt to assure uniform application, the committee
4 recommended that this Court amend the subsections to insure
5 uniform application.

6 RULE 32.2 PRECLUSION OF REMEDY

7 a. Preclusion. A ~~petitioner will not be given~~
8 DEFENDANT SHALL BE PRECLUDED FROM relief under this rule
9 based upon any ground:

10 (1) Still raisable on direct appeal under Rule 31 or on
11 post-trial motion under Rule 24;

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

14 (3) ~~Knowingly/voluntarily/and/intelligently/not~~
15 ~~raised~~ THAT HAS BEEN WAIVED at trial, on appeal, or in
16 any previous collateral proceeding.

17 b. Exceptions. Rule 32.2(a) shall not apply to claims
18 FOR RELIEF based on Rules 32.1(d), (e), (f) and (g). WHEN
19 A CLAIM UNDER RULES 32.1(d), (e), (f), OR (g) IS RAISED IN A
20 SUCCESSIVE OR UNTIMELY PETITION, THE PETITION MUST SET FORTH
21 THE REASONS FOR NOT RAISING THE CLAIM IN THE PREVIOUS
22 PETITION OR IN A TIMELY MANNER. IF THE PETITION DOES NOT
23 STATE MERITORIOUS REASONS SUBSTANTIATING THE CLAIM AND WHY
24 THE CLAIM WAS NOT STATED IN THE PREVIOUS PETITION OR IN A
25 TIMELY MANNER, THE PETITION SHALL BE SUMMARILY DISMISSED.
26

1 c//Inference/of/Waiver//The/court/may/infer/from/the
2 petitioner's/failure/to/appeal/or/to/raise/an/issue/on
3 appeal/after/being/advised/by/the/sentencing/judge/of/the
4 necessity/that/he/do/so/or/his/failure/to/raise/any/ground
5 then/available/to/him/in/a/previous/Rule/32/proceeding/in
6 which/he/was/represented/by/counsel//that/he/knowingly/
7 voluntarily/and/intentionally/relinquished/the/right/to/do
8 so/

9 d/ c. Standard of Proof. The prosecutor STATE
10 shall plead and prove any ground of preclusion by a
11 preponderance of the evidence, however, the inference of
12 section (c) shall be considered part of the evidence.

13 Reasons for Amending Rule 32.2:

14 The committee recognized inconsistent application of the
15 waiver provisions of Rule 32.2(a)(3). The previous rule
16 indicated that a defendant must "knowingly, voluntarily and
17 intelligently" not raise an issue at trial, on appeal, or in
18 a previous collateral proceeding before the issue was
19 precluded. This language was inserted into the rule in light
20 of the United States Supreme Court's opinion of Faye v. Noya,
21 372 U.S. 391 (1963). While it is the correct standard of
22 waiver for some constitutional rights, it is not the correct
23 standard for most trial errors. The committee recommended
24 that the language be amended to indicate that an issue that
25 could have been raised at trial, on appeal, or in a previous
26 collateral proceeding is deemed waived without considering

1 the defendant's personal knowledge, unless such knowledge is
2 specifically required to waive the constitutional right
3 involved. Because the standard of proof is on the state to
4 plead and prove any ground of preclusion by a preponderance
5 of the evidence, the state must prove that the defendant
6 waived the now asserted claim. If the asserted claim is of
7 sufficient constitutional magnitude, the state must show that
8 the defendant knowingly, voluntarily, and intelligently
9 waived the claim. For most claims of trial error, the state
10 may simply show that the defendant did not raise the error at
11 trial, on appeal, or in a previous collateral proceeding, and
12 that would be sufficient to show that the defendant has
13 waived the claim.

14 The exceptions to the waiver provisions are contained in
15 Rule 32.1(d), (e), (f) and (g). In a successive or untimely
16 petition, the petition itself must set forth the reasons for
17 not raising claims in a previous petition or in a timely
18 manner. If the petition does not state meritorious reasons
19 substantiating why the claim was not raised in a previous
20 petition or in a timely manner, the court shall summarily
21 dismiss the petition.

22 Because the committee has deleted the knowingly,
23 voluntarily, and intelligent language under subsection
24 (a)(3), the inference of waiver section in subsection (c) is
25 no longer needed.
26

1 RULE 32.3 NATURE OF PROCEEDING AND RELATION TO OTHER
2 REMEDIES

3 This proceeding is part of the original criminal action
4 and not a separate action. It displaces **AND INCORPORATES**
5 all **SUPERIOR COURT** post-trial remedies except post-trial
6 motions//~~appeal~~/~~and~~/~~habeas~~/~~corpus~~. If a ~~petitioner~~
7 **DEFENDANT** applies for a writ of habeas corpus in a court
8 having jurisdiction of his person **RAISING ANY CLAIM**
9 attacking the validity of his conviction or sentence, that
10 court ~~may~~ **SHALL** under this rule transfer the cause to
11 the court where the ~~petitioner~~ **DEFENDANT** was convicted
12 or sentenced and the latter court ~~may~~ **SHALL** treat it as
13 a petition for relief under this rule.

14 Reasons for Amending Rule 32.3:

15 The committee recognized the confusion that arises when
16 criminal defendants file habeas corpus petitions in the
17 superior court raising claims that should properly be brought
18 under Rule 32. To eliminate this confusion, the committee
19 recommends that the court amend Rule 32.3 to clearly indicate
20 that Rule 32 displaces and incorporates all superior court
21 post-trial remedies except post-trial motions. Once the rule
22 is amended, the trial courts shall transfer all petitions for
23 habeas corpus or other motions for post-trial relief to the
24 court where the defendant was convicted, and that court shall
25 treat it as a petition for relief under Rule 32.

RULE 32.4 COMMENCEMENT OF PROCEEDINGS

1
2 a. Form, Filing and Service of Petition. A proceeding
3 is commenced by TIMELY filing a ~~petition~~ NOTICE OF
4 POST-CONVICTION RELIEF with the clerk of the SUPERIOR
5 court IN THE COUNTY in which the conviction occurred, on a
6 form furnished by the clerk of that court. ~~A petition may~~
7 ~~be filed at any time after entry of judgment and~~
8 ~~sentence.~~ IN A NON-CAPITAL CASE, THE NOTICE MUST BE
9 FILED WITHIN NINETY DAYS OF THE ENTRY OF JUDGMENT AND
10 SENTENCE OR WITHIN THIRTY DAYS OF THE ORDER AND MANDATE
11 AFFIRMING THE JUDGMENT AND SENTENCE ON DIRECT APPEAL,
12 WHICHEVER IS THE LATER. IN A CAPITAL CASE, THE CLERK OF THE
13 SUPREME COURT SHALL AUTOMATICALLY FILE A NOTICE FOR
14 POST-CONVICTION RELIEF WITH THE TRIAL COURT UPON THE ISSUANCE
15 OF A MANDATE AFFIRMING THE DEFENDANT'S CONVICTION AND
16 SENTENCE ON DIRECT APPEAL. ANY NOTICE NOT TIMELY FILED MAY
17 ONLY RAISE CLAIMS PURSUANT TO RULE 32.1(d), (e), (f) OR
18 (g). ~~It~~ THE NOTICE shall bear the caption of the
19 original criminal action or actions to which it pertains.
20 ~~Upon its receipt,~~ ON RECEIPT OF THE NOTICE, the clerk
21 shall file a copy of the ~~petition~~ NOTICE in the case
22 file of each such original action and promptly send copies to
23 THE DEFENDANT, the county attorney and the attorney
24 general, noting IN THE RECORD the date and manner of
25 sending THE COPIES ~~in the record~~. If the conviction
26 occurred in a court other than the Superior Court, the copy

1 shall be sent to the office of the prosecuting attorney who
2 represented the state at trial. THE STATE SHALL NOTIFY THE
3 VICTIM ON REQUEST.

4 b. Notification of Appellate Court. If an appeal of the
5 ~~petitioner's~~ DEFENDANT'S conviction, sentence, or both
6 is pending, the clerk, within 5 days after the filing of the
7 ~~petition~~ NOTICE for post-conviction relief, shall send a
8 copy of the ~~petition~~ NOTICE to the appropriate Appellate
9 Court, noting IN THE RECORD the date and manner of sending
10 THE COPIES ~~in the record~~.

11 c. APPOINTMENT OF COUNSEL. UPON THE FILING OF A TIMELY
12 NOTICE, THE PRESIDING JUDGE SHALL APPOINT COUNSEL FOR THE
13 DEFENDANT WITHIN FIFTEEN DAYS IF REQUESTED AND THE DEFENDANT
14 IS DETERMINED TO BE INDIGENT. IN NON-CAPITAL CASES, THE
15 APPOINTMENT OF COUNSEL IN SUCCESSIVE OR UNTIMELY PETITIONS IS
16 WITHIN THE DISCRETION OF THE PRESIDING JUDGE. IN NON-CAPITAL
17 CASES, APPOINTED COUNSEL FOR THE DEFENDANT SHALL HAVE
18 SIXTY DAYS FROM THE DATE OF APPOINTMENT TO FILE A PETITION
19 RAISING CLAIMS UNDER RULE 32.1. A NON-CAPITAL DEFENDANT
20 PROCEEDING WITHOUT COUNSEL SHALL HAVE SIXTY DAYS FROM THE
21 FILING OF THE NOTICE TO FILE A PETITION. IN CAPITAL CASES,
22 APPOINTED COUNSEL FOR THE DEFENDANT SHALL HAVE ONE HUNDRED
23 TWENTY DAYS FROM THE DATE OF APPOINTMENT TO FILE A PETITION
24 RAISING CLAIMS UNDER RULE 32.1. A CAPITAL DEFENDANT
25 PROCEEDING WITHOUT COUNSEL SHALL HAVE ONE HUNDRED TWENTY DAYS
26 FROM THE FILING OF THE NOTICE TO FILE A PETITION. ON A

1 SHOWING OF GOOD CAUSE, A DEFENDANT IN A NON-CAPITAL CASE MAY
2 BE GRANTED A THIRTY DAY EXTENSION WITHIN WHICH TO FILE THE
3 PETITION. ON A SHOWING OF GOOD CAUSE, A DEFENDANT IN A
4 CAPITAL CASE MAY BE GRANTED A SIXTY DAY EXTENSION IN WHICH TO
5 FILE THE PETITION. IN NON-CAPITAL CASES, ADDITIONAL
6 EXTENSIONS OF THIRTY DAYS SHALL BE GRANTED ONLY IN
7 EXTRAORDINARY CIRCUMSTANCES. IN CAPITAL CASES, ADDITIONAL
8 EXTENSIONS OF THIRTY DAYS MAY BE GRANTED FOR GOOD CAUSE.

9 d. TRANSCRIPT PREPARATION. IF THE RECORD OF THE TRIAL
10 PROCEEDINGS HAS NOT BEEN PREVIOUSLY TRANSCRIBED, THE
11 DEFENDANT MAY REQUEST THAT THE RECORD BE PREPARED. THE COURT
12 SHALL ORDER THOSE PORTIONS OF THE RECORD PREPARED THAT IT
13 DEEMS NECESSARY TO RESOLVE THE ISSUES TO BE RAISED IN THE
14 PETITION. THE PREPARATION OF THE RECORD SHALL BE AT COUNTY
15 EXPENSE IF THE DEFENDANT IS INDIGENT. THE TIME FOR FILING OF
16 THE PETITION SHALL BE TOLLED FROM THE TIME A REQUEST FOR THE
17 RECORD IS MADE UNTIL THE RECORD IS PREPARED OR THE REQUEST IS
18 DENIED.

19 e. Assignment of Judge. The proceeding shall be
20 assigned to the sentencing judge where possible. If it
21 appears that ~~it is~~ THE SENTENCING JUDGE'S testimony will
22 be relevant, ~~it is~~ THAT JUDGE shall transfer the case to
23 another judge.

24
25

d/f. Stay of Execution of Death Sentence;

Notification of Supreme Court.

1
2
3 If the *petitioner* DEFENDANT has received a sentence
4 of death and *the/Supreme/Court/has/fixed/the/time/for*
5 *execution/of/the/sentence/* A WARRANT OF EXECUTION IS
6 ISSUED, the Superior Court ~~may~~ SHALL AUTOMATICALLY
7 stay such execution *pending/a/final/determination/of/the*
8 *proceeding//in/which/case* UPON THE FILING OF THE NOTICE
9 FOR POST-CONVICTION RELIEF. The clerk OF THE SUPERIOR
10 COURT shall notify the Clerk of the Supreme Court, THE
11 DEFENDANT, THE ATTORNEY GENERAL, AND THE DIRECTOR OF THE
12 STATE DEPARTMENT OF CORRECTIONS of the granting of the
13 stay. When the proceeding is finally determined, and the
14 time prescribed in Rule 32.9(c) has elapsed without the
15 filing of a petition for review, the clerk shall notify the
16 Clerk of the Supreme Court *of/the/final/determination/of*
17 *the/proceeding*. Notwithstanding the foregoing, if the
18 *petitioner* DEFENDANT has previously filed a petition
19 under subsection (a) of this rule which has been finally
20 disposed of pursuant to Rules 32.5 through 32.9, *infra*, ~~no~~
21 A stay of execution shall NOT be granted upon the filing
22 of a second or subsequent petition except upon separate
23 application for a stay to the Supreme Court, setting forth
24 with particularity those issues *raised/which/are* not
25 precluded under Rule 32.2.
26

Reasons for Amending the Rule:

1
2 The committee recognized that under the present system of
3 post-conviction relief, a defendant could exercise his right
4 of post-conviction relief at any time after the trial. The
5 time limits of the rule seek to ensure "prompt and final"
6 resolution of the matter. Under the old system, the
7 defendant was required to file a petition for post-conviction
8 relief raising various issues. The trial court then
9 appointed counsel, and counsel was limited to a short period
10 of time within which to review the record and file an amended
11 petition supplementing the issues raised or presenting new
12 claims. The committee viewed such a procedure to be counter
13 productive, and that it did not insure finality for the
14 victims of crime. Therefore, the committee recommended that
15 in non-capital cases a defendant begin the process by filing
16 a "notice" within 90 days of the entry of judgment and
17 sentence or within 30 days of the order and mandate affirming
18 the judgment and sentence on direct appeal, whichever is
19 later. This notice would be in essence similar to a notice
20 of appeal. The notice would be the procedural mechanism to
21 alert the trial court to appoint an attorney to begin the
22 post-conviction relief process. The trial court would
23 appoint counsel within 15 days if requested by an indigent
24 defendant. The appointment of counsel in successive or
25 untimely petitions is within the discretion of the presiding
26 judge. In non-capital cases, appointed counsel would be

1 required to file a petition raising claims under Rule 32.1
2 within 60 days from the date of appointment.

3 The committee recognized that in capital cases a slightly
4 different approach should be taken. In a capital case, the
5 clerk of the supreme court automatically files the notice of
6 post-conviction relief once the conviction and sentence is
7 affirmed on the direct appeal. In a capital case, the trial
8 court shall appoint counsel for indigent defendants within
9 15 days after the notice of post-conviction relief is filed.
10 Appointed counsel for a defendant in a capital case shall
11 have 120 days from the date of appointment to file a petition
12 raising claims under Rule 32.1. A defendant in a capital
13 case may be granted a 60-day extension within which to file
14 the petition.

15 The committee recognized that in some circumstances a
16 defendant may not file a direct appeal but seek
17 post-conviction relief. Under those circumstances, the
18 defendant's trial or change of plea proceedings may not be
19 transcribed. In such circumstances, the defendant would need
20 to file a request with the trial court to order portions of
21 the record prepared so that the defendant could prove the
22 issues to be raised in the petition. At the discretion of
23 the trial court, the court may order the record prepared, and
24 the time provisions would be tolled during such period.

25 The committee recognized that criminal defendants with a
26 warrant of execution should have the execution stayed

1 automatically during the first petition for post-conviction
2 relief. In successive petitions, the committee did not
3 believe that the rule should change that requires that the
4 defendant seek a stay with the supreme court.

5 RULE 32.5 CONTENTS OF PETITION//APPOINTMENT//OF//COUNSEL

6 a. Contents. THE//PETITIONER//SHALL//PROVIDE//ALL
7 INFORMATION//REQUIRED//BY//THE//FORM//THE//PETITIONER//SHALL
8 INCLUDE//EVERY//GROUND//KNOWN//TO//HIM//FOR//RECALLING//REDUCING/
9 CORRECTING//OR//OTHERWISE//CHANGING//ALL//JUDGMENTS//OR
10 SENTENCES//IMPOSED//UPON//HIM//AND//VERIFY//UNDER//OATH//THAT//HE
11 HAS//DONE//SO//FACTS//WITHIN//HIS//PERSONAL//KNOWLEDGE//SHALL//BE
12 NOTED//SEPARATELY//FROM//OTHER//ALLEGATIONS//OF//FACT//AND//SHALL
13 BE//UNDER//OATH// Affidavits, records, or other evidence
14 currently available to the PETITIONER DEFENDANT
15 supporting the allegations of the petition shall be attached
16 to it. Legal AND RECORD citations and memoranda of points
17 and authorities are NOT required. PETITIONS//WHICH//ARE
18 INCOMPLETE AN INCOMPLETE PETITION shall be returned to
19 the PETITIONER DEFENDANT for completion.

20 b.//REQUIRED//APPOINTMENT//OF//COUNSEL//IF//SATISFIED//THAT
21 PETITIONER//UPON//COMPLETING//UNDER//OATH//THE//QUESTIONNAIRE
22 REQUIRED//BY//RULE//8.1(A)(b)//IS//INDIGENT//THE//COURT//SHALL
23 APPOINT//COUNSEL//IF//FOR//THE//FIRST//PETITION//OF//ANY
24 PETITIONER//IF//FOR//EACH//PETITION//OF//ANY//PETITIONER
25 SENTENCED//TO//DEATH//OR//IF//FOR//THE//FIRST//PETITION//RAISING//A

1 claim/of/ineffective/assistance/of/counsel//counsel/may
2 file/an/amended/petition/within/30/days/of/appointment/
3 c//Discretionary/Appointment/of/Counsel//If/the
4 petitioner/desires/appointed/counsel/on/a/subsequent
5 petition/and/if/the/court/is/satisfied/that/he/or/she/is
6 indigent//the/court/may/appoint/counsel/who/may/file/an
7 amended/petition/within/that/30/days/of/appointment/
8 If/the/court/declines/to/appoint/counsel/the/reason/for
9 such/decision/shall/be/set/forth/in/writing/

10 Reason for Amending Rule 32.5:

11 With the changes regarding the commencement of the
12 proceedings, the committee recommends that Rule 32.5 be
13 amended to require that a criminal defendant seeking
14 post-conviction relief present legal and record citations and
15 memoranda of points and authorities with his petition.
16 Petitions that are not complete should be returned to the
17 defendant for completion. The appointment of counsel
18 sections were deleted because appointment of counsel is
19 covered now in Rule 32.4(c).

20 RULE 32.6 ADDITIONAL PLEADINGS; SUMMARY DISPOSITION;

21 AMENDMENTS

22 a. Prosecutor's Response. Twenty/days FORTY-FIVE
23 DAYS after the filing of the petition, or/10/days/after
24 the/filing/of/an/amended/petition/pursuant/to
25 Rule/32.5(b), the prosecutor STATE shall file with
26 the court and send to the petitioner DEFENDANT and

1 OR counsel for the petitioner DEFENDANT, a response.
2 which may be supported by affidavits and the record of
3 such portions thereof as are appropriate or material to the
4 questions raised in the petition. AFFIDAVITS, RECORDS OR
5 OTHER EVIDENCE AVAILABLE TO THE STATE CONTRADICTING THE
6 ALLEGATIONS OF THE PETITION SHALL BE ATTACHED TO IT. ON A
7 SHOWING OF GOOD CAUSE, THE STATE MAY BE GRANTED A THIRTY DAY
8 EXTENSION TO FILE A RESPONSE. ADDITIONAL EXTENSIONS SHALL BE
9 GRANTED ONLY IN EXTRAORDINARY CIRCUMSTANCES.

10 b. Petitioner's DEFENDANT'S Reply. Within 10
11 FIFTEEN days after receipt of the prosecutor's response,
12 the petitioner DEFENDANT may file a reply. EXTENSIONS
13 SHALL BE GRANTED ONLY IN EXTRAORDINARY CIRCUMSTANCES.

14 c. Summary Disposition. The court shall review the
15 petition within 10 TWENTY days after the petitioner's
16 DEFENDANT'S reply was due. If upon reviewing the
17 petition, response, reply, files and records, and
18 disregarding defects of form, if THE COURT SHALL IDENTIFY
19 ALL CLAIMS THAT ARE PROCEDURALLY PRECLUDED UNDER THIS RULE.
20 IF THE COURT, AFTER IDENTIFYING ALL PRECLUDED CLAIMS,
21 determines that no REMAINING CLAIM PRESENTS A material
22 issue of fact or law which would entitle the
23 petitioner DEFENDANT to relief under this rule and that
24 no purpose would be served by any further proceedings, if
25 may THE COURT SHALL order the petition dismissed. or
26 grant leave to file an amended petition // otherwise // the

1 court/shall/direct/that/the/proceeding/continue/and/set/a
2 hearing/within/10/days/ IF THE COURT DOES NOT DISMISS
3 THE PETITION, THE COURT SHALL SET A HEARING WITHIN THIRTY
4 DAYS ON THOSE CLAIMS THAT PRESENT A MATERIAL ISSUE OF FACT OR
5 LAW. IF A HEARING IS ORDERED, THE STATE SHALL NOTIFY THE
6 VICTIMS, UPON REQUEST, OF THE TIME AND PLACE OF THE HEARING.

7 d. Amendment of Pleadings. Amendments/to/pleadings
8 shall/be/liberally/allowed/at/all/stages/of/the/proceeding
9 prior/to/entry/of/judgment/ AFTER THE FILING OF A
10 POST-CONVICTION RELIEF PETITION, NO AMENDMENTS SHALL BE
11 PERMITTED EXCEPT BY LEAVE OF COURT UPON A SHOWING OF GOOD
12 CAUSE.

13 Reasons for Amending Rule 32.6:

14 The committee recommended that the court amend
15 Rule 32.6(a) to require the state to provide similar
16 affidavits, records or other evidence contradicting the
17 allegations of the petition and to require the state to
18 attach it to the response. The committee felt that like the
19 defendant the state's response time should be prescribed to a
20 reasonable amount of time.

21 The committee recognized that the 10-day requirement in
22 present Rule 32.6(b) for trial courts to review the pleadings
23 is simply being ignored by the superior court judges. The
24 committee recommended that the time period be increased to
25 20 days in which the superior court judges shall review the
26 petition and response. The court should review the pleadings

1 and determine and identify all claims that are procedurally
2 precluded under Rule 32. If the court determines that all
3 issues are precluded, it should dismiss the petition. If the
4 court determines that some of the claims are not precluded,
5 the court should identify those claims and indicate whether a
6 hearing on those claims is required. If the court finds that
7 the claims are meritless, and no hearing is required for the
8 resolution of the claim, the court should summarily dismiss
9 the petition. If a hearing is ordered, the hearing should be
10 held within 30 days.

11 The committee recognized that there is potential abuse
12 and unnecessary delay in the system by allowing defendants to
13 liberally amend their pleadings through all stages of the
14 post-conviction relief process. Because the committee
15 recommends that an attorney be appointed in the first
16 instance, and given an opportunity to review the record prior
17 to filing of the petition, the committee recommended that no
18 amendments should be permitted after the filing of a petition
19 except by leave of the court upon a showing of good cause.

20 RULE 32.7 ~~PREHEARING~~ INFORMAL CONFERENCE

21 The court may AT ANYTIME hold ~~a/prehearing~~ AN
22 INFORMAL conference to expedite the proceeding. ~~at/which~~
23 ~~the/petitioner~~ THE DEFENDANT need not be present, if
24 ~~he~~ THE DEFENDANT is represented by counsel who is
25 present.
26

1 RULE 32.8 EVIDENTIARY HEARING

2 a. Plenary Hearing. The ~~petitioner~~ DEFENDANT shall
3 be entitled to a hearing to determine issues of material
4 fact, with the right to be present and to subpoena
5 witnesses. ~~in his/her behalf//where~~ IF facilities are
6 available, the court may, in its discretion, order the
7 hearing to be held at the place ~~of confinement//~~ WHERE THE
8 DEFENDANT IS CONFINED, giving at least 5 days notice to the
9 officer in charge of the confinement facility. A verbatim
10 record of the hearing shall be made.

11 b. Evidence. The rules of evidence applicable in
12 criminal proceedings shall apply, except that the
13 ~~petitioner~~ DEFENDANT may be called to testify at the
14 hearing.

15 c. Burden of Proof. The ~~petitioner~~ DEFENDANT shall
16 have the burden of proving the allegations of fact by a
17 preponderance of the evidence. If a constitutional defect is
18 proven, the ~~prosecutor~~ STATE shall have the burden of
19 proving that the defect was harmless beyond a reasonable
20 doubt.

21 d. Decision. The court shall rule within 10 days ~~of~~
22 ~~submission~~ AFTER THE HEARING ENDS. If the court finds
23 in favor of the ~~petitioner~~ DEFENDANT, it shall enter an
24 appropriate order with respect to the conviction, sentence or
25 detention, any further proceedings, including a new trial and
26 conditions of release, and other matters that may be

1 necessary and proper. The court shall make specific findings
2 of fact, and state expressly its conclusions of law relating
3 to each issue presented.

4 Reasons for Amending Rule 32.8:

5 The only substantive change to Rule 32.8 appears in
6 subsection (d). The committee believed that the trial courts
7 should not allow a case to languish after the hearing.
8 Therefore the committee recommended that the rule be amended
9 to reflect that the court shall rule within 10 days after the
10 hearing ends.

11 RULE 32.9 REVIEW

12 a. Motion for Rehearing; Response; Reply. Any party
13 aggrieved by a final decision of the trial court in these
14 proceedings may, within 10 FIFTEEN days after the ruling
15 of the court, move the court for a rehearing setting forth in
16 detail the grounds wherein it is believed the court erred.
17 There shall be a response filed within 10 FIFTEEN days
18 and reply FILED within 10 days. THE FILING OF A MOTION
19 FOR REHEARING IN THE TRIAL COURT IS NOT A PREREQUISITE TO THE
20 FILING OF A PETITION FOR REVIEW PURSUANT TO SUBSECTION C OF
21 THIS SECTION.

22 b. Disposition When Motion Granted. If the motion FOR
23 REHEARING is granted, the court may EITHER (1) amend its
24 previous ruling without a hearing, or (2) grant a new hearing

25
26

1 and then either amend or reaffirm its previous ruling. THE
2 STATE SHALL NOTIFY THE VICTIM, UPON REQUEST, OF ANY ACTION
3 TAKEN BY THE COURT.

4 c. Petition for Review. Upon denial of a WITHIN
5 THIRTY DAYS AFTER THE FINAL DECISION OF THE TRIAL COURT ON
6 THE PETITION OR THE motion for rehearing, any party
7 aggrieved may petition the appropriate Appellate Court for
8 review of the actions of the trial court. The petition shall
9 be filed with the clerk of the trial court and within
10 10 days after the denial of the motion for rehearing
11 SHALL SET FORTH IN DETAIL THE GROUNDS WHEREIN IT IS BELIEVED
12 THE COURT ERRED. THE FILING OF A MOTION FOR REHEARING
13 PURSUANT TO SUBSECTION (a) OF THIS SECTION DOES NOT LIMIT THE
14 ISSUES THAT MAY BE RAISED IN THE PETITION FOR REVIEW.
15 FAILURE TO RAISE ANY ISSUE IN THE PETITION FOR REVIEW SHALL
16 CONSTITUTE WAIVER OF APPELLATE REVIEW OF THAT ISSUE. THERE
17 SHALL BE A RESPONSE FILED WITHIN FIFTEEN DAYS AND A REPLY
18 WITHIN TEN DAYS.

19 d. STAY PENDING REVIEW. A MOTION FOR REHEARING OR A
20 PETITION FOR REVIEW FILED BY THE STATE PURSUANT TO THIS
21 SECTION SHALL STAY AN ORDER GRANTING A NEW TRIAL UNTIL FINAL
22 REVIEW IS COMPLETED. FOR ANY OTHER RELIEF GRANTED TO A
23 DEFENDANT, A STAY PENDING FURTHER REVIEW IS WITHIN THE
24 DISCRETION OF THE TRIAL OR APPELLATE COURT. THE STATE SHALL
25 NOTIFY THE VICTIM UPON REQUEST OF ANY ACTION TAKEN.
26

1 d/ e. Filing of the Record. Within 30 days after
2 THE EXPIRATION OF THE TIME FOR filing of THE/petition
3 for review/ A REPLY, the record, including the trial
4 court file, and the reporter's transcript, PETITION FOR
5 REVIEW, RESPONSE AND REPLY, shall be transmitted to the
6 Appellate Court as provided in Rule 31.9.

7 e/ f. Disposition When Petition Granted. The
8 Appellate Court may, in its discretion, grant review and may
9 order oral argument upon the petition if deemed necessary and
10 may issue such orders and grant such relief as it deems
11 necessary and proper. THE STATE SHALL NOTIFY THE VICTIM,
12 UPON REQUEST, OF ANY ACTION TAKEN BY THE APPELLATE COURT.

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

19 g/ h. Return of the Record. When the matter is
20 determined the clerk of the appellate court shall return the
21 record to the appropriate clerk of the trial court for
22 retention according to law.

23 i. IF THE DEFENDANT IS UNDER A WARRANT OF EXECUTION,
24 THE CLERK ON RESOLUTION OF THE PETITION FOR REVIEW SHALL
25 IMMEDIATELY NOTIFY THE DEFENDANT, THE ATTORNEY GENERAL, AND
26 THE DIRECTOR OF THE STATE DEPARTMENT OF CORRECTIONS OF THE

1 ACTION THAT IS TAKEN. IF A STAY HAS BEEN PREVIOUSLY
2 ENTERED, THE STAY AUTOMATICALLY TERMINATES ON THE DENIAL OF
3 THE PETITION FOR REVIEW OR THE ISSUANCE OF THE MANDATE
4 AFFIRMING THE DEATH SENTENCE.

5 Reasons for Amending Rule 32.9:

6 The substantive changes to Rule 32.9 are as follows:

7 (1) A motion for rehearing is not a prerequisite to the
8 filing of a petition for review; (2) a petition for review
9 from the denial or granting of post-conviction relief shall
10 set forth with specificity the issues for appellate review;
11 (3) the failure to raise any issue in a petition for review
12 shall constitute waiver of appellate review of that issue;
13 (4) a motion for rehearing or a petition for review filed by
14 the state shall stay an order granting a new trial until
15 final review is completed; (5) in a capital case, upon
16 resolution of the petition for review the stay previously
17 entered automatically terminates.

18 The committee believed that the requirement that a party
19 must move for reconsideration of an issue as a prerequisite
20 to filing a petition for review was nothing more than a
21 procedural trap to ensnare the unsuspecting defendant or
22 state prosecutor. The committee believed that the
23 elimination of this procedural trap would benefit both
24 justice and the bar. The committee recommended that motions
25 for reconsideration be allowed to protect the record and to
26 bring obvious error to the trial court. However, the

1 committee felt that, at the conclusion of a post-conviction
2 relief process, the defendant or the state was not required
3 to reurge the same argument already rejected by the trial
4 court.

5 The committee recommended that the petition for review
6 process be similar to the process from the court of appeals
7 to the supreme court in appellate matters. The defendant or
8 the state should set forth with specificity the issues
9 desired to be reviewed by the appellate court in the petition
10 for review. Because the record is automatically transmitted
11 to the appellate court, however, the parties need not attach
12 portions of the record to the petition for review.

13 The committee recognized that in some instances trial
14 courts were refusing to stay an order granting a new trial
15 pending resolution of a state's motion for rehearing or
16 petition for review because it was not authorized by the
17 rule. To remedy this error, the committee recommends that
18 the court amend Rule 32.9 to reflect that an order granting a
19 new trial may be stayed upon a motion for rehearing or a
20 petition for review filed by the state. Regarding other
21 relief granted to a defendant, a stay pending review is
22 within the discretion of the trial or appellate court.

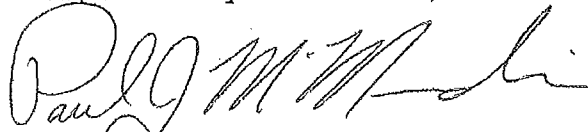
23 The committee recognized that after a petition for
24 post-conviction relief review is completed, a stay of the
25 warrant of execution that had previously been entered should
26 automatically terminate.

1 Conclusion

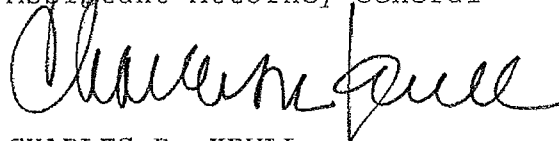
2 The Joint Legislative and Judicial Post-Conviction Relief
3 Study Committee believe that the proposed amendments to
4 Rule 32 are fair, and allow for the orderly administration of
5 post-conviction relief while at the same time insuring
6 finality for the victims of crime. We the co-chairmen of the
7 joint legislative and judicial study committee on
8 post-conviction relief recommend its adoption.

9 DATED this 29th day of January, 1992.

10 Respectfully submitted,

11 

12 PAUL J. McMURDIE
13 Assistant Attorney General

14 

15 CHARLES R. KRULL
16 Maricopa Public Defender

17 COPIES of the foregoing mailed
18 this 29th day of January, 1992, to
19 all Committee Members.

20 
21 JANET E. DYEK

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