No. 23-_____

IN THE SUPREME COURT OF THE UNITED STATES

LINO ALBERTO CHAVEZ,

Petitioner,

v.

RYAN THORNELL, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS;
KRISTIN K. MAYES, ARIZONA ATTORNEY GENERAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LINO ALBERTO CHAVEZ, Petitioner-Appellee, v. MARK BRNOVICH, Attorney General; DAVID SHINN, Director, Respondents-Appellants.	No. 21-15454 D.C. No. 2:19-cv-05424-DLR District of Arizona, Phoenix ORDER

Before: KLEINFELD, D.M. FISHER,* and BENNETT, Circuit Judges.

Lino Alberto Chavez filed a petition for rehearing or rehearing en banc. Dkt. No. 49. The panel has voted to deny the petition for rehearing. Judge Bennett has voted to deny the petition for rehearing en banc, and Judges Kleinfeld and Fisher so recommend. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing or rehearing en banc is **DENIED**.

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Lino Alberto Chavez,

Petitioner,

v.

Charles L Ryan, et al.,

Respondents.

No. CV-19-05424-PHX-DLR

ORDER

Before the Court is the Report and Recommendation ("R&R") of Magistrate Judge Michael T. Morrissey (Doc. 14) regarding Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1). The R&R recommends that the Petition be conditionally granted and that Petitioner be ordered released, unless within 90 days of the Court's Order, Petitioner is permitted to file a new of-right Rule 33 Petition for Post-Conviction Relief ("PCR"), including the filing of either a merits brief by counsel or a substantive brief consistent with *Anders v. California,* 386 U.S. 738 (1967). The Magistrate Judge advised the parties that they had fourteen days from the date of service to file specific written objections with the Court. (Doc. 14 at 11.) Respondents filed an objection to the R&R on September 22, 2020 (Doc. 15), and Petitioner filed his response on October 21, 2020 (Doc. 18). The Court presided over oral argument on January 20, 2021 and ordered supplemental briefing. (Doc. 26.) Petitioner filed the requested supplement on February 3, 2021 and Respondents filed their response on February 10,

2021. (Docs. 28, 30.)

I. Background

On October 3, 2012, Petitioner pled guilty to second-degree murder (Doc. 1-2 at 6-9) and on January 18, 2013, was sentenced to 16 years imprisonment (*Id.* at 10-15). On March 28, 2013, Petitioner filed a timely notice of PCR. PCR Counsel was appointed. After reviewing the record, counsel filed a "Notice of Completion of Post-Conviction Review" wherein she stated that she was "unable to find any claims for relief to raise in post-conviction relief proceedings." (*Id.* at 24-25.) The Maricopa County Superior Court relieved counsel of her responsibility to represent Petitioner but ordered her to remain in an advisory capacity and to forward the complete file to Petitioner. (*Id.* at 28-29.) The superior court set a deadline for Petitioner to file his "Pro Per Petition." (*Id.*)

On August 7, 2014, Petitioner filed a *pro per* PCR. (*Id.* at 33-64.) The superior court denied it, finding that there was no showing of ineffective assistance of counsel and that nothing counsel could have done would have changed Petitioner's sentence. (*Id.* at 69-71.) Petitioner filed a petition for review with the Arizona Court of Appeals (*Id.* at 72-79), alleging, among other things, that the Court of Appeals "must review for fundamental error in considering petition for review from denial of postconviction relief by pleading defendant, but Court may deny petition by summary order after examining record if it finds no fundamental error." (*Id.* at 74.) The Court of Appeals granted review but denied relief, holding that "an of-right Rule 32 petitioner is not entitled to a review of the record by the superior court for arguable issues as required for direct appeals under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969)." (*Id.* at 208-219); *State v. Chavez,* 407 P. 3d 85 (Ariz. Ct. App. 2017). Petitioner's petition for review by the Arizona Supreme Court was denied. (Doc. 1-2 at 221.)

On October 17, 2019, Petitioner filed this federal habeas petition, alleging that his Sixth and Fourteenth Amendment rights were violated by the failure to provide *Anders* review of his of-right Rule 32 proceeding. (Doc. 1.) The R&R recommended that Petitioner be granted conditional relief, finding that the Arizona Court of Appeals decision

denying his PCR was an unreasonable application of clearly established law under *Anders*. (Doc. 14.)

II. Discussion

The Arizona Court of Appeals found that "no *Anders*-type review is required in Rule 32 proceedings" and held that "the [Arizona] superior courts are not required to conduct *Anders* review in a Rule 32 of-right petition." *Chavez*, 407 P.3d at 89, 91. However, it is clearly established law that *Anders* applies to a defendant's first appeal as of right. *Pennsylvania v. Finely*, 481 U.S. 551, 554-55 (1987). Respondents conceded as much in their Response (Doc. 15 at 5) and confirmed that concession at the January 20, 2021 oral argument. The state court decision that no *Anders*-type review is required was an unreasonable application of clearly established law.

In their objection, Respondents do not argue that an *Anders* review is not required. Respondents instead argue that, even though it is required, the procedures provided to Petitioner were "at least as good as" those provided in *Anders*. Particularly, Respondents assert that the "Arizona procedures . . . reasonably ensured that [appeals of pleading defendants] would be resolved in a way related to the merits." (Doc. 15 at 5.)

In *Anders*, the Supreme Court protected the Sixth Amendment right to counsel in a first of-right appeal by laying out minimum procedures for allowing appellate counsel to withdraw when finding an appeal frivolous. First, *Anders* provided that counsel's withdrawal must be accompanied by "a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. Second, the defendant is to be provided with counsel's brief and allowed time to raise the points he chooses. *Id.* Third, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.*

The Supreme Court has made clear that the Constitution does not compel procedures identical to those described in *Anders*. *Smith v. Robbins*, 528 U.S. 259, 264, 273 (2000). Instead, states are given leeway to create their own procedure, so long as the protections implemented are "at least as good as" those provided in *Anders*. *Id.* at 276 ("*Anders*

procedure is merely one method of satisfying the requirements of the Constitution for indigent criminal appeals. States may [] craft procedures that in terms of policy, are [] at least as good as, that in *Anders*.").

In support of their argument that Arizona's procedures were at least as good as those provided in *Anders,* Respondents list the applicable Arizona procedures. Those Arizona procedures, however, are nearly identical to the California procedures rejected in *Anders*. (Doc. 15 at 6.) The procedures which the *Anders* Court found inadequate, like here, provided for appointment of counsel, counsel's review of the record, counsel's withdrawal after concluding the appeal lacked merit and so advising the court, the petitioner's filing of a *pro se* brief and reply to the state's response, and the district court's consideration of and ruling on the appeal's merits. In finding the California procedure inadequate, the *Anders* Court stated, "California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." *Anders*, 386 U.S. at 743. Rather, "[t]he constitutional requirement of substantial equality and fair process can only be obtained *where counsel acts in the role of an active advocate in behalf of his client*, as opposed to that of amicus curiae. The no-merit letter and the procedure it triggers do not reach that dignity." *Id.* at 744 (emphasis added).[1]

Submission of a mere no-merit letter unaccompanied by an *Anders* brief and the appointment of PCR counsel to "remain in an advisory capacity" until a final disposition of the PCR proceedings (Doc. 1-2 at 28) are not procedures "at least as good as" *Anders*' prophylactic framework. The role of advisory counsel, as described by Respondents' counsel at oral argument, is not that of an active advocate on behalf of his client. Moreover, a one-tier system, like Arizona's, is inadequate because the trial judge "who

[1] Further, the Supreme Court underscored that the purpose of *Anders* procedures is to afford "that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid." *Anders*, 386 U.S. at 745.

understandably had little incentive to find any error warranting an appeal" also reviewed the PCR petition. *Robbins,* 528 U.S. at 281 (noting that at least two tiers of review are required). Because the procedure employed by Arizona is substantively no different than the procedure the Court rejected in *Anders*, the R&R was correct in its determination that the Arizona procedures were not "at least as good as" those provided in *Anders*. Respondents' main objection is overruled. The Court now addresses Respondents' alternate objections.

Respondents next object that the R&R should not have considered or mentioned Respondents' contrary positions taken in prior cases, arguing that the positions they took then should not bind them, here, and that they should not be estopped from making inconsistent arguments. The Court agrees. However, the recommendations made by the R&R are not based on a finding that the Respondents were estopped from changing positions. The R&R correctly based its recommendations on its analysis of whether the state court decision violated clearly established law. This objection is overruled.

Respondents also object to the R&R for faulting them for "fail[ing] to address the flaw identified by the Court in [*Pacheco v. Ryan,* No. CV-15-02264-PHX-DGC, 2016 WL 7402742 (D. Ariz. Dec. 22, 2016)] that no precedent cited by parties exempts pleading defendants from *Anders* review." (Doc. 15 at 7 (internal citations omitted)). Respondents argue that in referencing *Pacheco*, the R&R wrongly burdened them with citing precedent that affirmatively demonstrated that Petitioner was not entitled to an independent fundamental-error review, rather than requiring Petitioner to affirmatively prove entitlement. In addition, they contend that the R&R's reliance on *Pacheco*, which does not constitute clearly established precedent, was misplaced. While Respondents correctly note that *Pacheco* is not clearly established precedent, the R&R's decision was not dependent on it. Rather, the R&R relied on Supreme Court decisions, such as *Finley*, as clearly established law that mandates a framework "at least as good as" *Anders* for all defendants in a first appeal as of right. (Doc. 14 at 6-7.) Contrary to Respondents' arguments, the R&R's reference to *Pacheco* did not burden Respondents with affirmatively demonstrating

the absence of a constitutional violation. Rather, by noting that *Pacheco* indicated that "[n]o precedent cited by the parties or found by this Court exempts pleading defendants from *Anders* review," the R&R expressed agreement with *Pacheco* that the "pleading defendant versus trial defendant" distinction does not exist. Respondents' objection is overruled.

Finally, at oral argument, Respondents raised the argument of procedural default, contending that Petitioner had not raised these claims in state court. (Doc. 26.) Having reviewed the supplemental briefing, the Court is persuaded that Petitioner's claims were properly presented to the Arizona Court of Appeals. And, even if they were not properly raised, the Court rejects Respondents' procedural default argument because the Court of Appeals did not rely on any independent state procedural bar in denying him relief, and Respondents waived this defense by waiting until oral argument to raise it. Accordingly,

IT IS ORDERED that Respondents' objection to R&R (Doc. 15) is **OVERRULED.**

IT IS FURTHER ORDERED that the R&R (Doc.14) is **ACCEPTED**.

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Doc. 1) is **CONDITIONALLY GRANTED.** Petitioner shall be released unless within 90 days of this Order, Petitioner is permitted to file a new of-right Rule 33 PCR proceeding, including the filing of either a merits brief by counsel or a substantive brief consistent with *Anders v. California,* 386 U.S. 738 (1967).

IT IS FURTHER ORDERED that a Certificate of Appealability and leave to proceed in forma pauperis on appeal are **DENIED** because Petitioner is being afforded the relief requested.

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IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment conditionally granting Petitioner's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (Doc. 1).

Dated this 25th day of February, 2021.

Douglas L. Rayes
United States District Judge

Hon. Joseph Welty, Chair
Task Force on Rule 32, Ariz. R. Crim. P., Petitioner
1501 W. Washington St.
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND RULE 32; TO ADOPT A NEW RULE 33; TO AMEND VARIOUS RULE 41 FORMS AND TO ADOPT NEW FORMS; TO RENUMBER RULE 33, ARIZONA RULES OF CRIMINAL PROCEDURE; AND TO ADOPT A CONFORMING CHANGE TO RULE 17.1(e), ARIZONA RULES OF CRIMINAL PROCEDURE	) Supreme Court No. R-19-____)) With a Request for a Modified) Comment Period

Petitioner is the Task Force on Rule 32 of the Arizona Rules of Criminal Procedure, which is submitting this petition through its undersigned chair. Petitioner requests this Court to amend Rule 32 and to adopt a new Rule 33, as shown in Appendices 2 and 3. Because new Rule 33 would displace current Rule 33 ("criminal contempt"), Petitioner requests the renumbering of current Rule 33 as Rule 35, which is presently "reserved." Petitioner also requests a conforming change to Rule 17.1(e).

The Court's adoption of the proposed rules would necessitate amendments to existing forms and the adoption of new forms. The new and amended forms will be based on substantive changes to Rules 32 and 33. Petitioner proposes a modified comment period that would allow Petitioner to file an amended petition after an initial comment period, and to concurrently file proposed forms that reflect Petitioner's substantive rule changes following the round of initial comments.

Because of the extent of the proposed revisions to Rule 32, Petitioner does not believe a version showing deletions and additions to the current rule would be useful. However, Petitioner is submitting an appendix (Appendix 4) that details and analyzes the proposed changes to Rule 32, and how the provisions of proposed Rule 33 differ from, or are like, the corresponding provisions of Rule 32.

1. Background. A previous Supreme Court Task Force, the Task Force on the Arizona Rules of Criminal Procedure, undertook a global restyling of the criminal rules, including Rule 32. (See Rule Petition No. R-17-0002.) The previous Task Force recognized the need for substantive revisions to Rule 32, but because its primary objective was restyling, it refrained from making significant substantive changes to Rule 32. Instead, the Criminal Rules Task Force recommended that the Court establish another committee for that purpose.

On January 24, 2018, the Court entered Administrative Order No. 2018-07, which established the Task Force on Rule 32 of the Arizona Rules of Criminal

Procedure (hereinafter "Task Force"), the present petitioner. The Order directed the Task Force to "identify possible substantive changes that improve upon the objectives of Rule 32 and the post-conviction relief process."

Task Force membership includes judges from the Arizona Court of Appeals in Divisions One and Two; judges of the Superior Court of Arizona in Maricopa, Coconino, Mohave, and Pima Counties; a municipal court judge; an equal number of prosecutors and defense counsel, including representatives of the Office of the Arizona Attorney General and the Federal Public Defender's Office; a victims' rights representative; and a professor from the James E. Rogers College of Law at the University of Arizona. Task Force staff includes the chief staff attorney of Division Two, and a specialist from the Court Services Division of the Administrative Office of the Courts ("AOC").

The Task Force met five times in 2018, usually in full-day sessions and frequently with guests in attendance. The Chair established three workgroups to review assigned issues, and these workgroups collectively had ten meetings. There were also several informal meetings involving one or two judges and staff, or the Chair and staff, which were devoted to revising the Task Force work product and drafting new Rule 33.

At the first Task Force meeting, a member from the Pima County Public Defender's Office and the Division Two chief staff attorney presented memoranda

that identified 18 issues requiring discussion. A list of these items is in Appendix 1. The Task Force subsequent noted other issues. Some issues overlapped. A few issues were resolved relatively easily. Other issues were complex and required extensive legal research and extended conversations. All the issues were ultimately addressed. However, three issues deserve special mention.

2. Proposed Rule 33. The term "of-right" petition first appears in the second paragraph of current Rule 32.1. This term, which is derived from case law, is one that many stakeholders find unclear and confusing. Members considered alternative nomenclature, but they found no better substitute for this term. Although they discussed separating of-right provisions into their own distinct sections of Rule 32, they also realized that this might confound self-represented litigants seeking a clear explanation for the of-right process. Furthermore, the term "of-right" requires users to distinguish pleading defendants from non-pleading defendants, which is another confusing subset of terminology, especially for self-represented defendants.

Ultimately, the Task Force decided to locate within a new Rule 33 all the provisions concerning post-conviction relief for defendants who entered a guilty or no-contest plea, who admitted a probation violation, or who had an automatic probation violation because of a plea to a new offense. This allows "pleading" defendants to have a single, self-contained rule, customized to their procedural circumstances, to guide them through the post-conviction process. This new rule is

more understandable because it no longer includes references to of-right defendants. Defendants availing themselves of Rule 33 will have no need to consult Rule 32 and search for the provisions that apply to their cases. Similarly, Rule 32 is self-contained for defendants who seek post-conviction relief after a trial or a contested probation violation hearing, or who have been sentenced to death. Thus, non-pleading defendants will no longer need to sift through of-right provisions that have no application to their situations, as they must do under current Rule 32.

One drawback of the split Rule 32/Rule 33 solution is that Rule 33 necessarily duplicates many of the provisions in Rule 32, and duplication increases the length of the Criminal Rules. The Task Force considered including in Rules 32 and 33 only the provisions that are not common to both, and then creating a third rule that contained provisions that apply to both non-pleading and pleading defendants. However, that would defeat the advantage of having truly self-contained rules for these distinct categories of defendants. Another drawback of the Rule 32/33 split is that future amendments to one rule might need to be made to the other. In addition, when counsel rely on an appellate opinion interpreting one of these rules, they might need to show that it also applies to a parallel provision in the companion rule that governs their case. Finally, the reorganization and renumbering of rule subparts because of the split might make legal research more challenging. However, the consensus of the Task Force is that for years to come, self-represented litigants,

practitioners, and judges will not only become accustomed to the change, they also will benefit from the clarity and focus of two distinct, self-contained rules.

Proposed Rules 32 and 33 are in Appendices 2 and 3.

3. The matter of preclusion. The Task Force concluded that two additional grounds for relief in Rule 32.1 (and the corresponding grounds in Rule 33) should not be subject to the rule of preclusion. Rule 32.1(b) currently provides as a ground for relief that "the court did not have jurisdiction to render a judgment or to impose a sentence on the defendant." Rule 32.1(c) affords a defendant sentencing relief if "the sentence imposed exceeds the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law." Under current Rule 32.4(a)(2), a defendant may not seek relief under Rule 32.1(b) or (c) in an untimely proceeding. A defendant also is precluded by current Rule 32.2(a)(3) from raising such a claim if the defendant could have, but did not, raise it at trial, on appeal, or in a previous post-conviction proceeding.

The Task Force concluded that the term jurisdiction in current 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. Defendants rarely raise true claims of lack of subject matter jurisdiction in post-conviction proceedings, but the Task Force believed as a matter of policy that those claims should not be

precluded, consistent with the principle that subject matter jurisdiction can be raised at any time. See *State v Espinoza*, 229 Ariz. 421 (App. 2012); see also *State v. Maldonado*, 223 Ariz. 309 (2010).

Members also discussed the troubling 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 in a timely manner, or who had that awareness only after he or she has already concluded a post-conviction proceeding. Although these defendants might file a Rule 32 petition as soon as they become aware of the discrepancy, that is often not until the Department of Corrections provided computations of their sentences pending the approach of their anticipated release dates. The notice or the petition would be subject to summary dismissal on grounds of preclusion or untimeliness, leaving the defendant with no remedy. See, e.g., *State v. Diaz*, 236 Arizona 361 (2014), *State v. Goldin*, 239 Ariz. 12 (App. 2015), and *State v. Gonzales* 216 Ariz. 11 (App. 2007).

Accordingly, the Task Force recommends changes to proposed Rule 32.2(b) ("claims not precluded"), to Rule 32.4(a) (setting time limits for filing the notice), and to the corresponding provisions of proposed Rule 33 (33.2(b) and 33.4(a), so that claims under Rule 32.1(b) or (c), or under Rule 33.1(b) or (c), would not be subject to preclusion based on waiver or untimeliness). The Task Force believes that the number of meritorious claims under these sections is relatively small. And

if a court did not have subject matter jurisdiction, or if a sentence is truly illegal, the interests of victims and the judicial system's interest in the finality of judgments are not furthered by precluding those claims. Proposed Rules 32.2(b) and 33.2(b) would further provide that when a defendant raises a claim that falls under 32.1(b) through (h) or 33.1(b) through (h), he or she

> must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why defendant did not raise the claim in a previous notice or petition, the court may summarily dismiss the notice.

4. Rule 32.1(h). Current Rule 32.1(h) affords relief upon "clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty beyond a reasonable doubt, or that the death penalty would not have been imposed." In *State v. Miles*, 243 Ariz. 511 (2018), this Court considered the application of Rule 32.1(h) in a death penalty case. Although the majority's disposition of the case did not rest on an interpretation of this provision of the rule, the case presented this issue: "Can newly proffered mitigation ever constitute clear and convincing evidence under Rule 32.1(h) that a sentencer would not have imposed the death penalty?" *Miles*, 243 Ariz. at 513, ¶ 6. Footnote 6 of a concurring opinion acknowledged the Chief Justice had established this Task Force and stated, "Rule 32.1(h) is a prime candidate for the Task Force's consideration." *Id.* ¶ 32 n. 6.

Rule 32.1 has a corollary in A.R.S. § 13-4231, which defines the scope of post-conviction relief. The provision in Rule 32.1(h) is not one of the specified statutory grounds for relief, and the Task Force initially addressed whether this presented a separation-of-powers issue. Members concluded that the adoption of Rule 32.1(h) was within the Court's prerogative and noted that in the two decades since its adoption, the Legislature has not sought to invalidate the rule. Beyond that, members had divergent views on addressing the footnote in *Miles*.

One view: One view proposed a two-pronged revision to section (h). Members with this view believed that the aggravation phase of a capital case relies on objective evidentiary findings, and the first prong would add to section (h) the phrase, "no reasonable fact-finder would find the defendant eligible for the death penalty in an aggravation phase held pursuant to A.R.S. § 13-752." The second prong would delete the words, "the death penalty would not have been imposed," and this would no longer allow relief under section (h) from a penalty phase verdict. These members believe that the current rule's standard— that the fact-finder would not have imposed the death penalty —is vague and subjective, requiring the PCR judge to get inside the mind of the original jury or judge, a nearly impossible task. Members holding this view believe that if a defendant such as Miles is going to obtain relief based on newly discovered mitigation evidence, it should be on grounds that this is newly discovered evidence under Rule 32.1(e) or that the evidence was

previously unknown because of the ineffective assistance of counsel, a claim that falls under Rule 32.1(a).

Another view: Another view is that the Arizona Supreme Court had three opportunities to consider the appropriateness of the provision at issue: first in the original rule petition, R-97-0006, then in a subsequent rule petition filed by the Arizona Attorney General, R-01-0015, and a third time in *Miles.* On each occasion, the Court either supported the rule or retained its substance.

Members holding this view further noted that Rule 32.1(h) has a high standard that is difficult to meet, and that on only a handful of occasions have capital defendants sought relief under this provision. These members therefore do not anticipate a flood of new petitions seeking relief under that provision because of *Miles.* They also believe that the revisions proposed by members holding the first view do not just clarify the rule, as *Miles* requested, but substantively change the rule, which they believe was unnecessary.

A third view: At the November Task Force meeting, a member introduced another proposed revision to Rule 32.1(h). The intent of this version is only to address the issue presented in *Miles* by clarifying that the standard is an objective one. That proposed revision states 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 <u>of the offense</u>

beyond a reasonable doubt, or that no reasonable fact-finder would have imposed the death penalty ~~would not have been imposed~~.

Following further discussion, members voted on whether to include in their final version of Rule 32 the amendments proposed by the first view, or the amendments proposed at the November meeting. Seven members favored the newly proposed November modification, six members favored the revisions proposed by the first view, and one member abstained. Accordingly, the version shown directly above is included in the proposed amendments to Rule 32, as shown in Appendix 2. However, a member holding the first view submitted a position statement that is contained in Appendix 5.

5. Other issues. Although Rule 32 was recently restyled, the Task Force made further changes to grammar and syntax to improve the rule's clarity and increase its readability. In addition to the substantive changes discussed in the previous pages of this petition, the following substantive and stylistic changes are also noteworthy. References below are to the proposed rules. Please note that Appendix 4 contains a more detailed description of the proposed rule revisions.

A. Rules 32.4(b)(3)(A) and 33.2(b)(3)(A): *State v. Whitman*, 234 Ariz. 565 (2014) clarified that the time for filing a notice of appeal runs from the oral pronouncement of sentence, rather than from when the judgment of sentence is filed, and Rule 31.2(a) was amended accordingly. The Task

Force proposes similar amendments to make Rules 32 and 33 consistent with Rule 31 and with *Whitman.*

B. Rule 32.5(b): The proposed amendment would require the appointment of co-counsel to a capital post-conviction proceeding "if the trial court finds that such assistance is reasonably necessary." This amendment codifies current practices in Maricopa County.

C. Rules 32.5(d) and 33.5(c): Proposed amendments to these rules clarify that upon the filing of a notice, the defendant's prior counsel must share files and other communications with PCR counsel, and that this sharing of information does not waive the attorney-client privilege or confidentiality claims.

D. Rules 32.6(b) and 33.6(b): These proposed amendments would essentially codify *Canion v. Cole*, 210 Ariz. 598 (2005), by allowing parties to conduct discovery for good cause after a petition has been filed. The proposed amendments also would supersede *Canion* by allowing discovery after the filing of a notice but before the filing of a petition upon a showing of substantial need. The proposed rules provide different standards for allowing discovery in each of these circumstances.

E. Rules 32.6(c) and 33.6(c): After discussing *State v. Chavez*, 243 Ariz. 313 (App. 2017), members decided to establish a list of rule requirements that

counsel must address when filing a Notice of No Colorable Claims. The lists in Rule 32 and Rule 33 are different because they are tailored to whether the defendant was convicted after a trial or entered a plea.

F. Rules 32.6(f) and 33.6(f): Members added these rule provisions to provide that when a defendant raises a claim of ineffective assistance of counsel in a PCR notice, the defendant "waives the attorney-client privilege as to any information necessary to allow the State to rebut the claim, as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4)."

G. Rules 32.7(c) and 32.9(c): To provide more realistic limits for the length of petitions, responses, and replies in capital cases, these rules increase the limits to 160, 160, and 80 pages, respectively. Also, a provision in current Rule 32.4(c)(1)(D) that requires counsel in a capital PCR to provide status reports to the Supreme Court under specified circumstances has been omitted based on a belief that although these reports might have been of benefit in the past, they now have limited value.

H. Rules 32.10(a) and 33.10(a): These provisions would extend to PCR proceedings the rights to a change of judge provided by Rules 10.1 and 10.2 whenever the PCR proceeding is assigned to a new judge.

I. Rules 32.10(b) and 33.10(b): The court hears disputes regarding public records requests by special action. These amendments would allow the

judge assigned to a PCR proceeding to hear and decide the records dispute, whether raised by special action or by motion, if it concerns access to public records requested for the PCR proceeding.

J. Rules 32.11(d) and 33.11(d): *Fitzgerald v. Myers*, 243 Ariz. 84, 86 ¶ 1 (2017) held "that neither A.R.S. § 13-4041 nor Rule 32.5 requires a trial court to determine whether a Rule 32 petitioner is competent before proceeding with and ruling on the PCR petition." However, the Court added that a trial court may order a competency evaluation "if it is helpful or necessary for a defendant's presentation of, or the court's ruling on, certain Rule 32 claims…." These proposed amendments would codify that holding by allowing the trial court to "order a competency evaluation if the defendant's competence is necessary for a presentation of the claim." The proposed amendments intentionally omit a cross-reference to Rule 11 to allow trial judges to fashion an ad hoc process for the infrequent occasions when competency might arise in a post-conviction proceeding.

K. Rules 32.14 and 32.16/33.14 and 33.16: Current Rule 32.9 is titled "review." Current Rules 32.9(a) and (b) pertain to a motion for rehearing in the trial court. Current Rules 32.9(c) through (i) concern a petition for review in an appellate court. The proposed rules bifurcate the provisions of current Rule 32.9 into separate rules, one addressing rehearing and the

other concerning appellate review. The proposed rules are also internally reorganized for better readability.

L. Rules 32.15 and 33.15: Criminal Rule 31.3(b) permits suspension of an appeal to allow the trial court to decide a Rule 24 or Rule 32 issue. That Rule 31 provision also requires an appellant to notify the appellate court when the trial court has decided the issue. This new rule clarifies that when there is a post-conviction proceeding in the trial court concurrently with a pending appeal, defense counsel or a self-represented defendant has a duty to notify the appellate court when the trial court grants or denies post-conviction relief.

M. Rules 32.16(a)(4) and 33.16(a)(4): These rules clarify the process for requesting extensions of time for appellate filings in post-conviction proceedings.

N. Rules 32.17 and 33.17: These rules eliminate the distinction between mandatory testing and discretionary testing of DNA because the Task Force did not find the distinction to be meaningful.

6. Conforming Change to Rule 17.1(e). Rule 17.1(e) currently provides:

> **Waiver of Appeal.** By pleading guilty or no contest in a noncapital case, a defendant waives the right to have the appellate courts review the proceedings on a direct appeal. A defendant who pleads guilty or no contest may seek review only by filing a petition for post-conviction relief under Rule 32 and, if it is denied, a petition for review.

If the Court adopts proposed Rule 33, the reference to Rule 32 in the second sentence of the above provision should be changed to Rule 33.

7. Forms. This petition also requests conforming amendments to certain Rule 41 forms, including Form 23 ("Notice of Rights of Review after Conviction in Superior Court"), Form 24(b) ("Notice of Post-Conviction Relief"), and Form 25 ("Petition for Post-Conviction Relief"). There might be multiple versions of these forms; the specific version the court or the defendant would use would depend on the procedural posture of the case, for example, whether the defendant was found guilty after a trial, or whether the defendant entered a guilty plea. Petitioner believes it would be beneficial to have the guidance of an initial set of public comments concerning the proposed rules before submitting proposed forms, and Petitioner therefore requests a modified comment period. (Blank spaces appear for form numbers in the proposed versions of Rules 32 and 33 shown in the appendix pending the future numbering of these forms.)

8. Request for Modified Comment Period and Conclusion. Petitioner recognizes that this petition proposes significant, substantive changes to Arizona rule provisions regarding post-conviction relief. Public comments might address issues the Task Force has overlooked, or might improve the proposed rules in other ways. Petitioner therefore requests a modified comment period to accommodate the filing of an amended petition after an initial round of public comments. A bifurcated

comment period would permit the Task Force, after considering the initial comments, to submit a revised set of amendments and proposed forms for further public review and comment. After the close of a second round of comments, Petitioner would file a reply and present any additional changes.

Petitioner suggests the following schedule:

February 22, 2019:	First round of comments due
April 5, 2019:	Amended Petition due
May 1, 2019:	Second round of comments due
June 14, 2019:	Reply due

Petitioner requests the Court to: (a) open this petition for comments during the modified periods described above and set new due dates for an amended petition and reply; and (b) abrogate current Rule 32 and associated forms and, subject to modifications proposed by Petitioner's amended petition or reply, adopt proposed new rules and forms for post-conviction proceedings.

RESPECTFULLY SUBMITTED this 10th day of January 2019.

By _____
Hon. Joseph Welty, Chair

Issues the Task Force considered at its initial meeting included the following:

Distinctions between rules and applicable statutes
Preclusion
Discovery
Diaz and *Goldin* issues
Privilege and confidentiality waivers
Subject matter jurisdiction
Illegal sentences and preclusion
Anders-type review/*Chavez* issues
Mata issues
Notice to appellate court on suspension
Content of notice
Time limits for filing notice and petition
Whitman issue
Competence and *Fitzgerald* issues
Rule 32.1 redrafting "of right" language
Extensions to file a petition for review
Rule 32.4(c) expansion of extension time frames
Rule 32.1(h)/*Miles* issue
Notice of change of judge in a PCR proceeding (Rule 10.2)
Mandate the assignment of two lawyers in capital PCRs (Rule 6.8)

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

Rule 33.1. Scope of Remedy

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

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

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

Grounds for Relief. Grounds for relief are:

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

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

(c) the sentence, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law or by the plea agreement;

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

(e) newly discovered material facts probably exist, and those facts probably would have changed the judgment or sentence. Newly discovered material facts exist if:

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

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

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

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

COMMENT

Rule 33. 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 United States or Arizona constitutions.

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

Rule 33. 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 to the offense;

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

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

(b) Claims Not Precluded.

(1) ***Generally.*** Claims for relief based on Rule 33.1(b) through (h) are not subject to preclusion under Rule 33.2(a). However, when a defendant raises a claim that falls under Rule 33.l(b) through (h) in a successive or untimely post-conviction notice, the defendant must explain the reasons for not raising the claim in a previous notice or petition, or for not raising the claim in a timely manner. If the notice does not provide reasons why the defendant did not raise the claim in a previous notice or petition, or in a timely manner, the court may summarily dismiss the notice. At any

time, a court may determine by a preponderance of the evidence that an issue is precluded, even if the State does not raise preclusion.

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

[NEW] COMMENT TO RULE 33.2(a)(1)

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

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

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

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

COMMENT

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

Rule 33 does not restrict the scope of the writ of habeas corpus under Ariz. Const. art. 2, § 14. *See* A.R.S. §§ 13-4121 et seq., which provides a remedy for individuals who are unlawfully committed, detained, confined or restrained. But if a convicted defendant files a petition for a writ of habeas corpus (or an application with a different title) that seeks relief available under Rule 33, the petition or application will be treated as a petition for post-conviction relief.

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

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

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

(b) Notice Requesting Post-Conviction Relief.

(1) ***Where to File; Forms.*** The defendant must file a notice requesting post-conviction relief under Rule 33 in the court where the defendant was sentenced. The court must make "notice" forms available for defendants.

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

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

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

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

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

(D) *Excusing an Untimely Notice.* The court must excuse an untimely notice of post-conviction relief filed under subpart (3)(A) or (3)(C) if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault.

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

(A) *Superior court.* Upon receiving a notice, the superior court clerk must file it in the record of each original case to which it pertains. Unless the court summarily dismisses the notice, the clerk must promptly send copies of the notice to the defendant, 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 filed a timely or first notice under Rule 33.4, or a notice under Rule 33.4(b)(3)(C), the presiding judge must appoint counsel for the defendant if:

(1) the defendant requests it;

(2) the defendant is entitled to an appointed counsel under Rule 6.1(b); and

(3) there has been a previous determination that the defendant is indigent, or the defendant has completed an affidavit of indigency

(4) and the court finds that the defendant is indigent.

Upon 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 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.

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

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

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

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

(b) Discovery.

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

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

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

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

(2) the specific materials that counsel reviewed;

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

(4) the dates counsel discussed the case with the defendant;

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

In the notice, counsel should also identify the following:

(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. The court may extend the time for defendant to file that petition by 45 days from the date counsel filed the notice. The court may grant additional extensions only on a showing of extraordinary circumstances.

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

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

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

Rule 33.8. Transcription Preparation

(a) Request for Transcripts. If the 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) Orders Regarding Transcripts. The court must promptly review the defendant's request and order the preparation of only those transcripts it deems necessary for resolving issues the defendant has specified in the notice.

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

later than 60 days after the entry of an order granting the defendant's request for transcripts.

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

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

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

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

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

(b) Defendant's Reply. The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.

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

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

Rule 33.10. Assignment of a Judge

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

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

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

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

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

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

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

Rule 33.12. Informal Conference

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

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

Rule 33.13. Evidentiary Hearing

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

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

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

(d) Decision.

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

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

(A) the conviction, sentence, or detention;

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

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

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

Rule 33.14. Motion for Rehearing

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

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

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

(d) Effect on Appellate Rights. Filing of a motion for rehearing is not a prerequisite to filing a petition for review under Rule 33.16.

(e) Disposition if Motion Granted. If the court grants the motion for rehearing, it may either amend its previous ruling without a hearing or grant a new hearing and then either amend or reaffirm its previous ruling. In either case, it 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 a petition for review of a defendant's conviction or sentence is pending, the defendant's counsel or the defendant, if self-represented, must file in the appellate court a notice of any relief granted or denied by the trial court.

Rule 33.16. Petiton and Cross-Petition for Review

(a) Time and Place for Filing.

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

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

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

(4) ***Extensions of Time for Filing Petition or Cross-Petition for Review; Requests for Delayed Petition or Cross-Petition for Review.*** 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 33.13(e), or that were otherwise available to the trial court and the parties; and are material to the issues raised in the petition or cross-petition for review.

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

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

6,000 words if typed or 22 pages if handwritten, exclusive of an appendix and copies of the trial court's rulings.

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

(A) copies of the trial court's rulings entered under Rules 33.2, 33.11, 33.13, and 33.14;

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

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

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

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

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

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

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

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

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

(A) No later than 30 days after a petition or cross-petition is served, a party opposing the petition or cross-petition may file a response in the appellate

court. Rule 31.3(d) governs computation of the deadline for filing the response.

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

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

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

(j) Transmitting the Record to the Appellate Court. No later than 45 days after receiving a notice of filing under section (b), the trial court clerk must transmit the record. 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, any exhibits admitted by the trial court in the post-conviction proceedings, and any documents or transcripts designed under section (b).

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

(l) Reconsideration or Review of an Appellate Court Decision. The provisions in Rules 31.20 and 31.21 relating to motions for reconsideration and petitions for

review in criminal appeals govern motions for reconsideration and petitions for review of an appellate court decision entered under section (k).

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

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

Rule 33.17. Post-Conviction Deoxyribonucleic Acid Testing

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

(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.

Details and Analysis of the Proposed Revisions to Rules 32 and 33

The Task Force proposes the deletion of all comments to current Rule 32, except as noted below.

Rule 32.1. Scope of Remedy

Proposed Rule 32.1 is perhaps the most significant rule because it establishes a foundation for the subsequent rules.

The Task Force retained the title of the current rule. However, it changed two of the three introductory section headings. (The proposed rule, like the current rule, does not have letter designations for these three introductory sections.)

The Task Force changed "petition for relief" to "generally" because neither the current nor the proposed provision mentions a petition. Instead, the provisions refer to a notice. The Task Force changed the nomenclature of the notice from the current "notice of post-conviction relief," to a more accurate "notice requesting post-conviction relief." This modified term is used throughout the rules. See further the discussion of proposed Rule 32.4 below. In addition, proposed Rule 32.1 no longer begins with the words "subject to Rules 32.2 [preclusion] and 32.4(a)(2) [time for filing a notice]" because while those provisions may ultimately bar relief, neither of those provisions preempts a defendant from filing a notice. Most importantly, although the current provision allows a defendant "convicted of, or sentenced for, a criminal offense" to file a notice, proposed Rule 32.1 allows a defendant to file a notice only "if the defendant was convicted and sentenced for a criminal offense after a trial or a contested probation violation hearing, or in any case in which the defendant was sentenced to death." Other circumstances that allow a defendant to file a notice requesting post-conviction relief are described in Rule 33.1 below.

Proposed Rule 32.1 deleted the title of the second section, now titled "of-right petition," because (1) the proposed rules no longer use that term, and (2) the concept of an of-right petition is now contained in proposed Rule 33. The Task Force added a new second subsection, "no filing fee," which is derived from the first section of the current rule.

The title of the third section, "grounds for relief," remains the same.

Grounds for relief are specified as sections (a) through (h). These letter designations are unchanged.

(a) Section (a) of the proposed rule (concerning constitutional violations) added two offsetting commas, but otherwise the provision is identical to the current one. Section (a) is the ground for relief most often requested in post-conviction petitions. Claims of ineffective assistance of counsel are asserted under this section.

(b) Section (b) of the proposed rule added the words "subject matter" before the word "jurisdiction" to clarify that it is a lack of subject matter jurisdiction, which cannot be waived, rather than a lack of personal jurisdiction, which can be waived, that gives rise to a claim for post-conviction relief.

(c) Section (c) of the proposed rule is significantly different than the current rule. The current rule provides relief if "the sentence imposed exceeds the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law." The Task Force believed a sentence "that exceeds the maximum authorized by law" is also "not in accordance with the sentence authorized by law," and therefore the former provision is unnecessary.

Furthermore, the Task Force discussed recurring situations where the sentence imposed by the court accorded with the law, but the sentence was subsequently recomputed by the Department of Corrections in a manner that deviated from the court's sentence. Its proposed rule attempts to address these situations by providing, "the sentence, as imposed by the judge or as computed by the Arizona Department of Corrections, is not authorized by law."

(d) Section (d) of the current rule provides that the defendant "continues to be in custody after his or her sentence expired." The proposed rule adds the terms, "or will continue to be," to permit a defendant to seek relief before the alleged expiration of the sentence.

(e) Section (e) of the proposed rule concerning newly discovered evidence is identical to the current rule except that the word "judgment" replaces the word "verdict."

(f) Current section (f) refers to a defendant who failed to file a timely "of-right" notice of post-conviction relief or a notice of appeal within the required time. The proposed version limits relief to the failure to timely file a notice of appeal, eliminating the pleading defendant's right to seek relief for failing to file a timely "of-right" notice of post-conviction relief. Proposed Rule 33 applies to that defendant. Under the proposed rule, the non-pleading defendant who fails to file a timely notice raising a claim under Rule 32.1(a), may ask the trial court to excuse the untimeliness pursuant to proposed Rule 32.4(b)(3). A notice raising claims under Rule 32.1(b) through (h) can be filed under proposed Rule 32.4(b)(3) "within a reasonable time after discovering the basis of the claim," so there is no per se untimeliness.

(g) The Task Force proposes a change to the wording of current Rule 32.1(g), which concerns a significant change in the law. The current rule says, "if applied to the defendant's case." The proposed rule says, "if applicable to the defendant's case," which the Task Force believes is more precise. Additionally, the word "judgment" replaces "conviction."

(h) To clarify that this provision applies to an individual offense rather than to an entire case if there are multiple offenses, the Task Force's proposed version of this provision adds the words "of the offense" after the word "guilty." The Task Force also proposes a change to the portion of the rule dealing with a death sentence, which is discussed more extensively in the body of the rule petition.

Comment: The Task Force restyled the existing comment. Throughout the comment, it changed the word "attack" to "challenge." In the section (a) comment, "traditional collateral attacks" in the current comment would become "traditional post-conviction claims" in the proposed version. Also, the words "or ineffective" were inserted between the words "incompetent counsel." The phrase "federal or Arizona constitutions" in the current comment to section (a) was changed to "United States or Arizona constitutions," which is the phrase used in the body of the rule. The Task Force would delete the comments to sections (b), (c), and (f) as either inaccurate, incomplete, or not useful.

Rule 33.1. Scope of Remedy

Proposed Rule 33.1 parallels proposed Rule 32.1 except as noted below.

First, in the "generally" section of proposed Rule 33.1, a defendant may file a notice "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." This compares with proposed Rule 32.1, which permits the filing of a notice after a trial or a probation violation hearing. Defendants who would file under proposed Rule 33 are currently referred to as "pleading defendants," a term that no longer appears in the proposed rules.

Although proposed Rule 33.1 eliminates the term, "of-right," the "generally" section of proposed Rule 33.1 retains the portion of the current rule that allows a defendant to file a second notice requesting post-conviction relief to challenge the effectiveness of counsel in the first post-conviction proceeding.

Grounds for relief:

(a) Unlike proposed Rule 32.1, which affords a defendant relief if the conviction was obtained or sentence was imposed in violation of the constitution, proposed Rule 33.1 allows relief if "the defendant's plea or admission to a probation violation" was so obtained. It includes similar sentencing relief as well.

(b) This subsection mirrors proposed Rule 32.1(b), adding "subject matter" before "jurisdiction."

(c) Like proposed Rule 32.1(c), proposed Rule 33.1(c) provides relief if the sentence imposed by the judge or as computed by the Arizona Department of Corrections was not authorized by law. However, proposed Rule 33.1(c) adds, "or by the plea agreement." This phrase would allow a defendant to enforce the terms of a plea bargain if the sentence deviated from the plea agreement.

(f) Whereas proposed Rule 32.1(f) provides relief for an untimely notice of appeal, proposed Rule 33.1(f) offers relief for the untimely filing of a notice of post-conviction relief. Proposed Rule 33.1 and other provisions in the Rule 33 series presume that a defendant who pled guilty or admitted a probation violation (a "pleading defendant") had no appeal because a direct appeal is not available to such defendants. See further Criminal Rule 17.1(e), which provides, "By pleading guilty or no contest in a noncapital case, a defendant waives the right to have the appellate courts review the proceedings on a direct appeal. A defendant who pleads guilty or no contest may seek review only by filing a petition for post-conviction relief under Rule 32 and, if it is denied, a petition for review." See also A.R.S. § 13-4033(B) ("In non-capital cases a defendant may not appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation.").

(h) Proposed Rule 33.1(h), like its Rule 32.1(h) counterpart, would afford relief if "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." However, this may misconstrue the application of Rule 33.1(h) in cases involving pleading defendants. The Task Force might modify this provision to require clear and convincing evidence that the defendant is actually innocent.

Rule 32.2. Preclusion of Remedy

Proposed Rule 32.2(a) ("preclusion") is similar to current Rule 32.2, except that the third specified ground ("waived at trial or on appeal, or in a previous collateral proceeding")

(1) changes the phrase "collateral proceeding" in Rule 32.2(a)(2) and (3) to "post-conviction proceeding"; and,

(2) adds the following language: "except when the claim raises a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant." This additional language is based on case law regarding claims of "sufficient constitutional magnitude" that cannot be deemed waived by inference.

Current Rule 32.2(b) relates to "exceptions to preclusion" and is referred to in the proposed subsection as "claims not precluded." The exceptions to preclusion have been expanded —from (d) through (h) in the current rule, to (b) through (h) as proposed. In other words, the only ground that remains subject to preclusion under Rule 32.2(a) are those that fall under Rule 32.1(a). However, if a defendant raises a claim under (b) through (h) in a successive or untimely notice, the notice must explain the reasons for not previously or timely raising it.

The first sentence of current section (c) ("standard of proof"), concerning the duty of the State to plead and prove preclusion, has been relocated to proposed Rule 32.9(a)(2), which deals with the contents of the State's response to the petition. The second sentence of current section (c), which permits the court to determine that an issue is precluded even when preclusion is not raised by the State, is now located in proposed Rule 32.2(b). It has been reworded to incorporate the standard of proof, which is a preponderance of the evidence, and allows the court to find a claim precluded even if the State does not raise it.

Rule 33.2. Preclusion of Remedy

Proposed Rule 33.2 is similar to proposed Rule 32.2. However, whereas proposed Rule 32.2(a)(1) precludes relief on a ground still raisable on appeal or under Rule 24, proposed Rule 33.2(a)(1) precludes relief on any ground "waived by pleading guilty to the offense." Because a pleading defendant will not have an appeal, proposed Rule 33.2(a)(2) and (a)(3) omit references to any ground adjudicated in an appeal or waived on appeal.

Although proposed Rule 32.2(b) states the exceptions to preclusion in a single paragraph titled "claims not precluded," proposed Rule 33.2(b) lists those exceptions in two subparts. The first subpart corresponds to the paragraph in proposed Rule 32.2(b). The second subpart, titled "ineffective assistance of post-conviction counsel," states that a defendant is not precluded from filing a timely second notice to raise a claim of ineffective assistance of counsel in the first Rule 33 proceeding. The Task Force added this to assure that the second notice, which is authorized by existing law, is not mistakenly precluded.

Comment: A new comment to proposed Rule 33.2(a)(1) explains what defenses are waived by a pleading defendant, acknowledging the general rule based on well-developed case law that a pleading defendant waives all non-jurisdictional defects and defenses.

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

Rule 32.3(a) ("generally") is similar to current Rule 32.3(a), except the proposed provision uses the phrase "replaces and incorporates" rather than "displaces and incorporates." And instead of "post-trial motions," the proposed rule uses "Rule 24 motions."

Current Rule 32.3(b) is titled "habeas corpus." Proposed Rule 32.3(b) is titled "other applications or requests for relief." The title and body of proposed section (b) omits the

Latin term "habeas corpus" and provides, "If a court receives any type of application or request for relief—however titled—," which would include petitions for writ of habeas corpus. A restyled comment to this proposed rule continues to use that term and provides context for its meaning; it is "a remedy for individuals who are unlawfully committed, detained, confined, or restrained."

Proposed Rule 32.3(c) ("defendant sentenced to death") provides that a defendant sentenced to death must proceed under proposed Rule 32, rather than proposed Rule 33, even if the defendant pled guilty to first-degree murder. This avoids multiple petitions—one petition for the guilty plea, and another petition for a penalty-phase trial—if the defendant enters a plea before the guilt phase of a capital case.

Comment: In addition to what is noted in section (b) above, the proposed comment also states that Rule 32.3 does not limit remedies that are available under Rule 24.

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

Proposed Rule 33.3(a) is identical to proposed Rule 32.3(a).

However, proposed Rule 33.3(b) ("other applications or requests for relief") is different than the corresponding Rule 32.3 provision. Whereas Rule 32.3(b) refers to a challenge to the validity of the defendant's conviction and sentence after a trial, Rule 33.3(b) refers instead to a challenge "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." Also, Rule 32.3(b) refers to transferring the application to the court where the defendant was convicted or sentenced; Rule 33.3(b) requires transfer to the court where the defendant was sentenced.

Because a defendant sentenced to death must seek relief under proposed Rule 32, proposed Rule 33 does not contain an analog to Rule 32.3(c), which applies only to capital defendants.

Rule 32.4. Filing a Notice Requesting Post-Conviction Relief

Two general changes are noteworthy.

First, under the current rule, a defendant is directed to file a "notice <u>of</u> post-conviction relief." The Task Force believed it would be more accurate if the rule said that the defendant files a "notice <u>requesting</u> post-conviction relief."

Second, the title of current Rule 32.4 is "filing of notice and petition, and other initial proceedings." The current rule is substantively dense. The Task Force therefore divided the current rule into seven proposed rules, as follows:

Rule 32.4 – Filing a Notice Requesting Post-Conviction Relief

Rule 32.5 – Appointment of Counsel

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

Rule 32.7 – Petition for Post-Conviction Relief

Rule 32.8 – Transcript Preparation

Rule 32.10 – Assignment of a Judge

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

Note also that current Rule 32.4(c) ("time for filing a petition for post-conviction relief") has been relocated to proposed Rule 32.7 (now titled, "petition for post-conviction relief") and combined with other provisions of current Rule 32.5 ("contents of a petition for post-conviction relief"). Because of that relocation, provisions concerning the contents and time for filing a petition are now contained in the same rule.

Proposed Rule 32.4 begins with a restyled section (a) consisting of a single sentence: "A defendant starts a Rule 32 proceeding by filing a Notice Requesting Post-Conviction Relief." This is straightforward and provides easy-to-understand guidance on how to begin a post-conviction proceeding.

Section (b) ("notice requesting post-conviction relief") includes subparts concerning where to file a notice and forms; the content of the notice; and, the time for filing the notice. Because proposed Rule 32 no longer applies to cases involving a plea or admission of a probation violation, the time for filing an "of right" notice or a second notice raising a claim of ineffective assistance of first post-conviction counsel is no longer in Rule 32.4, but has instead been relocated to Rule 33.4, albeit without the "of right" term. The time for filing a notice of a Rule 32.1(a) claim in proposed Rule 32.4 is essentially the same time provided by the current rule. Although current Rule 32.4 states, "within 90 days after the entry of judgment and sentence" or "within 30 days after the issuance of the final order or mandate in the direct appeal," the proposed rule provides, "within 90 days after the oral pronouncement of sentence," consistent with Rule 31.2(a), which was amended in light of *State v. Whitman*, 234 Ariz. 565 (2014).

If a defendant files an untimely notice of a claim under Rule 32.1(a), proposed Rule 32.4(b)(3)(D), gives the court discretion to excuse the untimeliness "if the defendant adequately explains why the failure to timely file a notice was not the defendant's fault." Under current Rule 32.4, there are deadlines for filing claims under Rule 32.1(a) through (c). Under the proposed rule, the deadlines would no longer apply to claims under Rule 32.1(b) and (c), as well as claims under (d) through (h). Proposed Rule 32.4(b)(3)(B) provides that claims under Rule 32.1(b) through (h) must be raised "within a reasonable time after discovering the basis of the claim."

Comment: A proposed new comment to Rule 32.4(a) explains the purpose of the notice. The comment states that the notice informs the trial court of a possible need to appoint counsel for the defendant, and it assists the court in deciding whether to summarily dismiss the proceeding as untimely or precluded.

Comment: The Task Force recommends retaining the current comment to Rule 32.4(a) concerning a simultaneously pending appeal.

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

Proposed Rule 33.4 is like Rule 32.4 except for the following.

As noted above, under proposed Rule 32.4(b)(3)(A), the time limit for a Rule 32.1(a) claim runs from the oral pronouncement of sentence (thereby addressing the *State v. Whitman* issue) or from the issuance of the mandate in the direct appeal. By comparison, under Rule 33.4(b)(3)(A), the time limit for a Rule 33.1(a) claim runs only from the oral pronouncement of sentence, because there should be no appeal directly after a plea.

Proposed Rule 32.4(b) includes a subpart for filing a notice in a capital case. Because Rule 33 does not apply to capital cases, it omits this subpart. However, proposed Rule 33.4 includes a subpart [(b)(3)(C)] concerning the time for filing a successive notice of a claim of ineffective assistance of counsel in the first Rule 33 proceeding. That is not in Rule 32.4 because as case law establishes, the non-pleading defendant does not have the right to raise a claim that counsel in the first Rule 32 proceeding was ineffective. See *State v. Mata*, 185 Ariz. 319, 336-37 (1996); *State v. Krum*, 183 Ariz. 288, 291-92 & n. 5 (1995); *Osterkamp v. Browning*, 226 Ariz. 485, ¶ 18 (App. 2011).

Finally, the duty of the Clerk to notify the appellate court of the filing of a notice of post-conviction relief is found only in Rule 32.4. As noted above, there is no direct appeal following a plea, and there is no need for a corresponding provision concerning this specific duty in proposed Rule 33.4.

Rule 32.5. Appointment of Counsel

Proposed Rule 32.5 is derived from current Rule 32.4(b). The proposed rule includes the two subparts of the current rule—one subpart for capital cases, and the other for non-capital cases—but it reverses the current order by placing the noncapital cases first, because non-capital cases are more common.

Proposed Rule 32.5(a) follows the current subpart by requiring the appointment of counsel in a non-capital case upon the filing of a timely or first notice requesting post-conviction relief. For all other notices, the appointment of counsel is discretionary. The current subpart concerning non-capital cases has two required factors for the appointment of counsel (i.e., the defendant requests counsel, and a finding that the defendant is indigent).

Proposed Rule 32.5(a) adds a third factor: that the defendant is entitled to appointed counsel under Rule 6.1(b). Proposed Rule 32.5(a) applies to misdemeanors as well as felonies, and there may be instances, especially with misdemeanors, where a defendant is not entitled to court-appointed counsel, even on a first or timely notice.

Proposed Rule 32.5(b) applies to capital cases and tracks the current rule, but it adds this sentence: "On application and if the trial court finds that such assistance is reasonably necessary, it must appoint co-counsel." This new sentence codifies current practices in the superior court.

Proposed Rule 32.5(c) is new. It concerns the appointment of investigators, expert witnesses, and mitigation specialists. Under Rule 6.7, the court has discretion to appoint one of these individuals, or a combination of them, at county expense.

Proposed Rule 32.5 also contains a new section (d) titled, "attorney-client privilege and confidentiality for the defendant." The provision addresses concerns regarding the duty of defendant's prior counsel to share with post-conviction counsel the defendant's file and other communications that may be privileged. This new rule affirms the duty of prior counsel to share the file and communications with post-conviction counsel and confirms that doing so does not waive the attorney-client privilege or confidentiality claims.

Rule 33.5. Appointment of Counsel

Proposed Rule 33.5 is similar to proposed Rule 32.5, except Rule 33.5 does not include a section regarding capital cases. Rule 33.5(a) ("generally") contains the three factors described in Rule 32.5(a). Proposed Rule 33.5 requires the appointment of counsel on a timely or first notice, or on a successive timely notice challenging the effectiveness of the first post-conviction counsel.

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

Proposed Rule 32.6 is based on current Rule 32.4(d). Like the current rule, the proposed rule begins with a requirement that counsel investigate the defendant's case for "any colorable claims." (The current rule uses the phrase, "any and all colorable claims," which the Task Force believes is redundant.)

The remainder of proposed Rule 32.6 departs from the current rule.

First, proposed Rule 32.6(b) contains a new provision on "discovery." Current Rule 32 has no discovery provision, and the Task Force believed that a new discovery provision would provide guidance for judges and parties when discovery is an issue in a post-conviction proceeding. Proposed Rule 32.6(b) contains two subparts. The first subpart, (b)(1), is titled, "after filing a notice." This provision would supersede *Canion v. Cole,* 210

Ariz. 598 (2005), by allowing discovery after the filing of a PCR notice but before the filing of a post-conviction petition, upon a showing of substantial need for material or information. This is the standard for a disclosure order under Rule 15.1(g). The second subpart, (b)(2), titled "after filing a petition," would allow discovery for good cause; the proposed provision includes a description of how the defendant could show good cause. The Task Force intended the standard for pre-petition discovery to be higher than the standard for post-petition discovery.

Second, proposed Rule 32.6(c) significantly expands what counsel is required to include in a "notice of no colorable claims." The notice must include five specified items (such as what counsel reviewed, and dates counsel discussed the case with the defendant). The proposed rule provides that counsel "should also identify" 13 additional items (including motions affecting the course of trial, the defendant's competency, jury issues, and post-trial motions).

Counsel's duties after filing a notice of no colorable claims, enumerated in current Rule 32(d)(2)(A), are in proposed Rule 32.6(e) and are substantively the same. Similarly, a provision on the defendant's pro se petition that is in current Rule 32.6(d)(2(B) is in proposed Rule 32.6(d) and is also substantively the same as the current rule.

Proposed Rule 32.6(f), titled "attorney-client privilege," is new. The section provides that a defendant who raises a claim of ineffective assistance of counsel waives the attorney-client privilege "as to any information necessary to allow the State to rebut the claim, as provided by Ariz. R. Sup. Ct. 42, ER 1.6(d)(4)."

Comment: A proposed new comment to Rule 32.6(b) advises that the standard for pre-petition discovery is derived from Rule 15.1(g).

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

Proposed Rule 33.6, sections (a) ("generally"), (b) ("discovery"), (d) ("defendant's pro se petition"), (e) ("counsel's duties after filing a notice under section (c)"), and (f) ("privilege") are the same as the corresponding sections of proposed Rule 32.6.

The differences between proposed Rules 32.6 and 33.6 are found in their respective sections (c) ("counsel's notice of no colorable claims"). The first five items that counsel must include in the notice are the same in both rules. Although proposed Rule 32.6(c) contains 13 addition items, proposed Rule 33.6(c) contains 7 items counsel should also identify. Those items are pertinent to a plea proceeding, but items that are relevant only to a non-pleading defendant are omitted.

Comment: Rule 33.6 includes the comment to Rule 32.6 noted above. It also includes an additional comment that refers to a proposed checklist form that counsel should use in

connection with an investigation under this rule. This comment describes the consequences of failing to complete, or deviating from, the form ("it does not constitute a per se deviation from prevailing professional norms...").

Rule 32.7. Petition for Post-Conviction Relief

Proposed Rule 32.7 is based on current Rule 32.4(c) ("time for filing a petition for post-conviction relief") and current Rule 32.5 ("contents of a petition for post-conviction relief").

To be consistent with proposed Rule 32.5, and unlike current Rule 32.4(c), the time limits in proposed Rule 32.7(a) for filing a petition in a non-capital case are located before the time limits for filing a petition in a capital case. In addition, proposed Rule 32.7(a)(1)(A) concerning noncapital cases indicates what capital case means (i.e., "except those cases in which the defendant was sentenced to death"). The number of days for each deadline in proposed Rule 32.7(a) are unchanged from the deadlines in current Rule 32.4(c).

The current provision regarding status reports to the Supreme Court has been deleted from proposed Rule 32.7(a)(2), because these reports now have limited benefit.

Proposed Rule 32.7(b) ("form of petition") mirrors current Rule 32.5(a).

In proposed Rule 32.7(c) ("length of petition"), which is based on current Rule 32.5(b), the requirements for non-capital and capital cases are provided separately and in that sequence. The current page limit for a petition in a capital case is 80 pages. The Task Force noted the inadequacy of that limit, and the need to have a limit that is more closely aligned with petitions that are currently filed in death penalty cases. Proposed Rule 32.7(c) accordingly increases the limit for petitions in capital cases to 160 pages. Page limits in current Rule 32.5(b) for responses to a petition and replies have been relocated to Rule 32.9 ("response and reply; amendments"). Proposed Rule 32.7 no longer includes the current rule's reference to of-right cases.

Proposed Rules 32.7(d) ("declaration"), (e) ("attachments"), and (f) ("effect of non-compliance") are substantively the same as current Rules 32.5 (c), (d), and (e).

Rule 33.7. Petition for Post-Conviction Relief

Proposed Rule 33.7 is similar to proposed Rule 32.7 except for the following.

The deadlines specified in proposed Rule 33.7(a) do not include a deadline for petitions in capital cases, because capital cases are governed by Rule 32. Otherwise, the deadlines in proposed Rule 32.7 are consistent with the deadlines in current Rule 32.4(c). Because there are no capital cases under Rule 33, the maximum length of a Rule 33 petition is the same as a non-capital petition under Rule 32.7: 28 pages.

Rule 32.8. Transcript Preparation

Proposed Rule 32.8 is based on current Rule 32.4(e). Proposed Rule 32.8(a) ("request for transcripts"), (b) ("order regarding transcripts"), (c) ("deadlines"), and (d) ("cost") are substantively similar to current Rule 32.4(e)(1)-(5), although certain provisions have been reorganized.

Proposed Rule 32.8(e) ("unavailability of transcripts") is new. If a transcript is unavailable, this new provision permits the parties to proceed in accordance with Criminal Rule 31.8(e) (a narrative statement) or Rule 31.8(f) (an agreed statement).

Rule 33.8. Transcript Preparation

Proposed Rule 33.8 is substantively similar to proposed Rule 32.8.

Rule 32.9. Response and Reply; Amendments

Proposed Rule 32.9 is based on current Rule 32.6. Rule 32.9(a) ("State's response") is substantively the same as current Rule 32.6(a), but it bifurcates the substance into two subparts, one concerning "deadlines" and the other concerning "contents." Rule 32.9(b) ("defendant's reply") is similar to current Rule 32.6(b).

Proposed Rule 32.9(c) ("length of response and reply") includes content taken from current Rule 32.5(b). Rule 32.9(c) is divided into two subparts, one for non-capital cases and the other for capital cases. Because proposed Rule 32.7 increases the maximum length of a petition in a capital case from 80 pages to 160 pages, and proposed Rule 32.9(c) increases the page limit for the response in a capital case from 80 pages to 160 pages and increases the page limit for the reply from 40 pages to 80 pages.

Proposed Rule 32.9(d) ("amending the petition") is similar to current Rule 32.6(c).

Current Rule 32.6(d) ("review and further proceedings") has been relocated to proposed Rule 32.11 ("court review of the petition, response, and reply; further proceedings").

Rule 33.9. Response and Reply; Amendments

The revisions in proposed Rule 33.9 mirror those in proposed Rule 32.9, with the exception that Rule 33.9 does not include references to capital cases.

Rule 32.10. Assignment of a Judge

Rule 32.10(a) ("generally") is based on current Rule 32.4(f) ("assignment of a judge"). But there are two notable changes.

First, proposed Rule 32.10(a) omits the second sentence of current Rule 32.4(f), which requires the presiding judge to reassign the case to a different judge "if the sentencing

judge's testimony will be relevant." The Task Force believed this circumstance was so rare that it did not warrant a rule provision.

The other change in proposed Rule 32.10(a) is the addition of a new second sentence, which applies the provisions of Criminal Rule 10.1 ("change of judge for cause") and Rule 10.2 ("change of judge as a matter of right") when the case is assigned to a new judge. Current Rule 32.3(a) and proposed Rule 32.3(a) both provide that "a post-conviction proceeding is part of the original criminal action and is not a separate action." Because the post-conviction proceeding is a continuation of the original action, the Task Force found no justification why Rules 10.1 and 10.2 should not have continuing applicability.

Proposed Rule 32.10 also contains a new section (b) titled, "dispute regarding public records." Public records disputes can be raised in post-conviction proceedings by a civil special action, which is assigned to a judge with a civil calendar. If the civil special action concerns access to public records requested for a post-conviction proceeding, the Task Force found no compelling reason why the judge assigned to the criminal proceeding should not resolve the dispute. This new provision would allow that, regardless of whether the issue is raised by special action or by motion.

Rule 33.10. Assignment of a Judge

Proposed Rule 33.10 is substantively the same as proposed Rule 32.10.

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

Proposed Rule 32.11(a) ("summary disposition"), (b) ("setting a hearing"), and (c) ("notice to victim") are based on current Rule 32.6(d) ("review and further proceedings), with similarly named subparts. Proposed section (a) is the same as the current corresponding subpart, and proposed section (c) has been modestly but not substantively restyled. The provision on setting a hearing truncates the corresponding current Rule 32.6(d) by eliminating text that the Task Force considered superfluous (i.e., if the court does not summarily dismiss the petition, it may set a hearing "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.") See further proposed Rules 32.11(b) and 32.13 on setting a hearing.

Proposed Rule 32.11(d) ("defendant's competence") is a new provision and represents the Task Force's response to *Fitzgerald v. Myers,* 243 Ariz. 84 (2017). This provision provides the court discretion to order a competency evaluation if the defendant's competency is necessary for the presentation of a post-conviction claim. However, the provision intentionally does not include a cross-reference to Rule 11 to allow the trial judge to fashion an ad hoc process for the infrequent occasions when this issue might arise in a post-conviction proceeding.

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

Proposed Rule 33.11 is identical to proposed Rule 32.11.

Rule 32.12. Informal Conference

This proposed rule is identical to current Rule 32.7.

Rule 33.12. Informal Conference

Proposed Rule 33.12 does not contain proposed Rule 32.12(b), which concerns informal conferences in capital cases. With that exception, proposed Rules 32.12 and 33.12 are identical.

Rule 32.13. Evidentiary Hearing

Proposed Rule 32.13 is identical to current Rule 32.8, with the exception that the section title of current Rule 32.8(a) ("rights attendant to the hearing; location; record") has been changed in proposed Rule 33.13(a) to "generally."

Rule 33.13. Evidentiary Hearing

Proposed Rule 33.13 is identical to proposed Rule 32.13.

Rule 32.14. Motion for Rehearing

Current Rule 32.9 is titled "Review." Proposed Rule 32.14 is based on current Rules 32.9(a) ("filing of a motion for rehearing") and 32.9(b) ("disposition if motion granted"), and in part on current Rule 32.9(d), as noted below.

Proposed Rule 32.14(a) ("timing and content"), (b) ("response and reply"), and (d) ("effect on appellate rights") correspond with subparts (1), (2), and (3) of current Rule 32.9(a).

Proposed Rule 32.14(c) ("stay") is based on current Rule 32.9(d) ("stay pending review"), but it omits a reference to a stay pending the State's filing of a petition for review, which is covered by proposed Rule 32.16(i). The proposed provision has been modestly restyled.

Proposed Rule 32.14(e) ("disposition if motion granted") is based on current Rule 32.9(b).

All the proposed provisions are substantively similar to their current counterparts.

Rule 33.14. Motion for Rehearing

Proposed Rule 33.14 is identical to proposed Rule 32.14.

Rule 32.15. Notification to the Appellate Court

Current Rule 32.4(a)(4), and proposed Rule 32.4(b)(4)(C), require the trial court clerk to send a copy of a notice requesting post-conviction relief to the appropriate appellate court. As further noted in the current comment to this provision, which proposed Rule 32.4 incorporates, the appellate court may stay the appeal pending an adjudication of the post-

conviction proceeding, and then consolidate its review of that proceeding with the appeal. However, the Task Force noted that current Rule 32 contains no mechanism for notifying the appellate court when the post-conviction proceeding was adjudicated. Proposed Rule 32.15 provides a mechanism. It requires the defendant's counsel, or a self-represented defendant, to promptly send to the appellate court a copy of any trial court ruling on a notice, a petition, or a motion for rehearing that grants or denies relief.

Rule 33.15. Notification to the Appellate Court

The Task Force recognized that there should not be an appeal associated with a Rule 33 proceeding, but it also contemplated that under Rule 33, a defendant may have a petition for review of a prior Rule 33 proceeding pending in an appellate court concurrently with a successive Rule 33 proceeding in the trial court. Rule 33.15 requires defendant's counsel or a self-represented defendant to provide a similar notice to the appellate court of any relief granted or denied by the trial court.

Rule 32.16. Petition and Cross-Petition for Review

Proposed Rule 32.16 is based on current Rule 32.9 ("review"), sections (c) through (i). There are multiple organizational changes, because bifurcating Rule 32.9 into a rule on motions for rehearing and a separate rule on petitions for review allowed the Task Force to move section and subpart headings up one level, allowing more visible titles and reducing organizational clutter.

There also are notable substantive changes.

- The current rule does not contain a separate provision for the length of a petition or response in a capital case. Proposed Rule 32.16(c)(1) would provide that a petition or response in a capital case must not exceed 12,000 words or 50 pages if handwritten [that is, doubling the limits provided for a petition in a non-capital case], exclusive of an appendix and copies of the trial court's rulings.
- The contents of a petition for review, described in proposed Rule 32.16(c)(2)(A), must also include copies of specified rulings by the trial court's, including the summary disposition of a notice requesting post-conviction relief.
- Proposed Rule 32.16(d) ("appendix accompanying a petition or cross-petition") no longer differentiates an appendix in a capital and a non-capital case. Rather, it eliminates any reference to the appendix in a capital case petition for review because the Supreme Court has electronic access to the complete trial court record in these situations.
- Proposed Rule 32.16(m) ("return of the record"), like current Rule 32.9(h), requires the appellate court to return the record to the trial court clerk after appellate resolution of the petition, but the proposed rule omits the last two words of the

current rule, "for retention." The Task Force believes that the trial court clerk does not require direction on what to do with the returned appellate record.

Rule 33.16. Petition and Cross-Petition for Review

Proposed Rule 33.16 is substantively similar to proposed Rule 32.16, except it does not include any provisions concerning petitions for review in capital cases.

Rule 32.17. Post-Conviction Deoxyribonucleic Acid Testing

Proposed Rule 32.17 is based on current Rule 32.12.

Because the remaining provisions of current Rule 32 apply only to capital cases, the Task Force proposes renumbering current Rule 32.12 as Rule 32.17, which will maintain parallel rule numbering throughout proposed Rules 32 and 33.

Current Rule 32.12 and proposed Rule 32.17 both have eight sections. Seven of the eight sections of the proposed rule make no substantive changes to the current provisions.

Proposed Rule 32.17(d) ("court orders") makes a substantive change to current Rule 32.12 (d). The current section includes a subpart concerning "mandatory testing," and another subpart on "discretionary testing." The Task Force did not perceive a meaningful difference in the criteria or application of these subparts. They accordingly merged these subparts into a single subpart (d)(1) titled "DNA testing."

The Task Force parenthetically notes that a defendant may submit a petition for DNA testing independently of a post-conviction petition. However, this provision on DNA testing has been included in Rule 32 for the past several years, and the Task Force does not propose to remove it from its proposed Rule 32.

Rule 33.17. Post-Conviction Deoxyribonucleic Acid Testing

Proposed Rule 33.17 is substantively similar to proposed Rule 32.17.

Note: The following three rules concern capital cases only. Consequently, Rule 33 contains no counterparts to these rules.

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

Proposed Rule 33.18 derives from current Rule 32.4(g). The provision has been slightly restyled, but it is substantively the same.

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

Proposed Rule 32.19 derives from, and is identical to, current Rule 32.10.

Rule 32.20. Extensions of Time; Victim Notice and Service

This rule is based on current Rule 32.11. Although current Rule 32.11(a) ("notice to the victim") includes a reference to "the victim in a capital case," the Task Force considered whether the statute referenced in the rule, A.R.S. § 13-4234.01, as well as other statutes regarding victims' rights, require this rule to include a provision for victims in non-capital cases. They concluded that the referenced statute applied only to capital cases, and that this rule did not need to encompass victims in non-capital cases.

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court

STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

July 24, 2018

RE: STATE OF ARIZONA v LINO ALBERTO CHAVEZ
Arizona Supreme Court No. CR-17-0582-PR
Court of Appeals, Division One No. 1 CA-CR 15-0482 PRPC
Maricopa County Superior Court No. CR2012-005785-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 24, 2018, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Janet Johnson, Clerk

TO:
Joseph T Maziarz
Terry M Crist
Robert E Prather
Randal Boyd McDonald
Lino Alberto Chavez, ADOC 277926, Arizona State Prison, Douglas - Mohave
David J Euchner
Keith James Hilzendeger
William G Montgomery
Amy M Wood

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,	)	Court of Appeals
	)	Division One
Respondent,	)	No. 1 CA-CR 15-0482 PRPC
	)	
v.	)	Maricopa County
	)	Superior Court
LINO ALBERTO CHAVEZ,	)	No. CR2012-005785-001
	)	
Petitioner.	)	
	)	
	)	

ORDER FOR ADDITIONAL BRIEFING

The court, Presiding Judge Kent E. Cattani, Judge Jon W. Thompson, and Judge Paul J. McMurdie, has considered the petition for review and the record presented in the above-captioned case. On the court's own motion, and specifically in light of the decision in *Pacheco v. Ryan*, CV-15-02264-PH-DGC, 2016 WL 7407242 (D. Ariz. Dec. 12, 2016), the court has determined that additional briefing may be helpful concerning the following issues:

1. By failing to raise his request for fundamental error review under *Anders v. California*, 386 U.S. 738 (1967), in his petition for post-conviction relief, has Petitioner waived his right to ask this Court to review his case for fundamental error?

1. Do the procedural requirements of *Anders v. California*, 386 U.S. 738 (1967), apply in a "Rule 32 of-right proceeding," and if so, how?

2. Did the superior court err by failing to review the record for fundamental error?

Accordingly,

IT IS OREDERED that the parties shall file simultaneous briefs on these issues no later than 30 days from the date of this order. The briefs shall be limited to no more than 7500 words.

Moreover, to ensure adequate briefing on the issues raised,

IT IS FURTHER ORDERED that Petitioner's former counsel, PEG GREEN, Deputy Maricopa County Public Defender, shall file a brief on the enumerated issues. The brief shall be filed no later than 30 days from the date of this order and shall be limited to no more than 7500 words.

The court invites other interested parties or organizations, including both the Arizona Attorney General and the Arizona Attorneys for Criminal Justice, to file amicus brief setting forth their respective positions. Any such amicus brief shall be filed no later than 45 days from the date of this order and shall be limited to no more than 7500 words. Accordingly,

IT IS FURTHER OREDERED that, in addition to the usual distribution, this order be sent to the Arizona Attorney General's Office and to the Arizona Attorneys for Criminal Justice.

IT IS FURTHER ORDERED that the parties may each file a responsive brief if any amicus brief is filed. The responsive brief, if any, shall be filed no later than 20 days after the time to file an amicus brief has run and shall be limited to 5000 words.

/s/
KENT E. CATTANI, Presiding Judge

A copy of the foregoing
was sent to:

Diane Meloche
Lino Alberto Chavez ADOC 277926 (mailed)
Margaret M Green (Former Counsel for Petitioner)
Mark Brnovich, Attorney General
Joseph T Maziarz (Attorney General's Office - Chief Counsel, Criminal Appeals Section)
Arizona Attorneys for Criminal Justice (mailed)
Arizona Attorneys for Criminal Justice (mailed)

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
01/29/2015 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-005785-001 DT 01/28/2015

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
K. Sotello-Stevenson
Deputy

STATE OF ARIZONA

v.

LINO ALBERTO CHAVEZ (001)

ROBERT E PRATHER

LINO ALBERTO CHAVEZ
#277926 ASPC DOUGLAS MOHAVE
P O BOX 5002
DOUGLAS AZ 85608
MARGARET M GREEN

COURT ADMIN-CRIMINAL-PCR

DENIAL OF RULE 32 RELIEF

This court has considered the Pro Per Rule 32 Petition For Post-Conviction Relief filed by defendant on August 7, 2014, the State's Response filed on October 31, 2014 and defendant's Reply filed on December 1, 2014. Further, this court has carefully considered the court record and has also taken into account the significant recall that still exists as to this matter.

Before addressing the legal issues presented, some prefatory comments are warranted. This was truly a tragic incident. The loss of life here to a promising and vibrant young lady is immeasurable. The devastation to her family is unfathomable.

With this noted, this court also continues to have great empathy for this defendant and his family. Unlike his co-defendant, this court previously and to this day believed that the level of culpability of the co-defendant was far greater than that of Mr. Chavez. This court was impressed with defendant throughout the proceedings and through sentencing, and felt deeply that the one overwhelming tragedy suffered by the victim and her family was now being compounded with another tragedy in the family of defendant. While the two losses are by no

means equivalent, the denial of the pervasive devastating impact these events had on the lives of many would be disingenuous.

At the time of sentencing, this court operated with beliefs that are consistent with the assertions now presented by defendant. He does have support from a loving and committed family; he was a relatively young offender; he had no direct intent to do harm; he was far less culpable than his co-defendant; he had no significant history of criminal behavior; he was truly remorseful for the events and losses suffered; he took responsibility for his actions. These conclusions and others to the benefit of defendant were known to the court for three reasons: First, defendant's own behavior and actions before this court support these findings; the information and showing from his family members support these findings; and the presentation made by his counsel prior to and at sentencing support these findings.

Regardless of what may or may not have occurred regarding the co-defendant during his case, this court was not privy to nor considered any efforts by co-defendant or his attorney to shift responsibility or place greater blame on Mr. Chavez. Rather, all sentencing decisions herein were based upon the version of events portrayed by or on behalf of Mr. Chavez.

All of the above would suggest that consideration of a mitigated sentence would have been appropriate. However, the law requires the court to also consider the aggravating factors and here, there is one such factor that is controlling; that being, the harm to the victim's family. The measure of the loss of one's child is incomprehensible. Words need not be expressed to know this to be true but yet in this matter, this court was confronted with the face and soul of that loss. This aggravating factor was of such magnitude that the court could have justifiably imposed the greatest sentence authorized under the plea agreement.

Yet the sentence imposed was the presumptive sentence, and it is reflective of the fact that while the loss was profound, the merit of defendant and his mitigating factors were also profound. In essence, this court is stating that whether defendant found the presentation of his counsel to be sufficient or lacking, this court assumed the truth of his current assertions at the time of sentencing. Any supplements to the presentation by his attorneys at the time of sentencing would not have in any way altered the results.

This court cannot assume that it knows what the State may have offered as settlement had there been additional presentation of mitigation made by counsel during settlement discussions. Such would be speculative, at best. What this court can know, however, is that in cases involving the loss of life, it is uncommon for the State to offer a plea that includes the possibility of a sentence of less than the presumptive sentence. Often, the offer requires an aggravated sentence, leaving possibly the range of the aggravated sentence to the court. Here, the offer allowed for as low as a 10 year mitigated sentence. This court cannot envision what

counsel could have presented that would have allowed for the possibility of a plea offer below 10 years. Even if the offer from the State had opened a range to below this level, the factors identified above would have still led this court to the same conclusion; that being that the presumptive sentence set by the legislature was appropriate.

Therefore, with this as the foundation for the court's sentencing determination, it is impossible to find that there is a colorable claim for relief under any section of Rule 32. While there is no showing made that there was ineffective assistance of counsel, even the assumption that more could have been done by counsel would not have altered the final determination of this court.

IT IS THEREFORE ORDERED denying Defendant's Petition For Post-Conviction Relief.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
01/30/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-005785-001 DT 01/29/2014

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
B. LaCorte
Deputy

STATE OF ARIZONA

v.

LINO ALBERTO CHAVEZ (001)

DIANE M MELOCHE

LINO ALBERTO CHAVEZ
#277926 ASPC DOUGLAS MOHAVE
P O BOX 5002
DOUGLAS AZ 85608
MARGARET M GREEN

COURT ADMIN-CRIMINAL-PCR

**NOTICE OF COMPLETION OF POST-CONVICTION RELIEF BY COUNSEL
DUE DATE FOR PRO PER PETITION**

The Court has received defense counsel's Notice of Completion of Post-Conviction Relief Review filed January 12, 2014, asserting no colorable claim for relief.

IT IS ORDERED as follows:

1) Defense counsel shall remain in an advisory capacity for defendant until a final determination is made by the trial court regarding any post-conviction relief proceeding, pursuant to Rule 32.4(c)(2), Arizona Rules of Criminal Procedure.

2) Defense/advisory counsel shall forward defendant the complete trial and appellate file including all transcripts in counsel's possession no later than February 13, 2014.

3) Defense/advisory counsel shall file a Notice of Compliance of such no later than February 13, 2014. The Notice of Compliance shall include an itemization of what constituted "the file" as well as the method of delivery of the file.

4) If he/she so chooses, defendant shall file a Pro Per Petition for Post-Conviction Relief no later than March 17, 2014.

5) The Court notes that pursuant to Rule 32.5, a Pro Per Petition shall contain defendant's certification that he/she has included every ground known to him/her for vacating, reducing, correcting or otherwise changing all or any judgments or sentences imposed upon him/her. One copy of the petition shall be served upon the Rule 32 Management Unit, and one copy shall be served upon the attorney for the State.

6) The Court advises defendant that failure to timely file the Pro Per Petition may be grounds for dismissal of this Rule 32 proceeding.

7) The State's Response to the Petition shall be filed within 45 after the Petition is filed.

8) Defendant may file the Reply within 15 days after the Response is filed.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.

Michael K Jeanes, Clerk of Court
*** Electronically Filed ***
I. OSUNA, Deputy
1/13/2014 2:50:27 PM
Filing ID 5650588

PEG GREEN
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State Bar Membership No. 011222
Attorney for DEFENDANT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, v. LINO ALBERTO CHAVEZ, Defendant.	No. CR-2012-005785-001 DT **NOTICE OF COMPLETION OF POST-CONVICTION REVIEW BY COUNSEL; REQUEST FOR EXTENSION OF TIME TO ALLOW DEFENDANT TO FILE *PRO PER* PETITION FOR POST-CONVICTION RELIEF** (Hon. Bruce R. Cohen; Rule 32 Management Unit)

Counsel for the defendant respectfully informs the Court that she has reviewed the following materials in this matter:

1) Superior Court instruments and minute entries;

2) Transcripts of the defendant's 8-24-12 settlement conference, 10-3-12 change of plea and 1-18-13 sentencing proceedings;

3) Trial counsel's trial file;

4) Letter from Chavez dated 11-28-13.

Having completed this review, counsel is unable to find any claims for relief to raise in post-conviction relief proceedings. Accordingly, counsel has no Petition for Post-Conviction Relief to file at this time.

Pursuant to *Lammie v. Barker*, 185 Ariz. 263, 915 P.2d 662 (1996), *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995), *op. sup.*, 182 Ariz. 118, 893 P.2d 1281 (*Montgomery II*) (1995), and *State v. Rodriguez*, 183 Ariz. 331, 903 P.2d 639 (App. 1995), counsel requests the Court extend the time for filing a Petition for Post-Conviction Relief for 45 days so the defendant may file a Rule 32 petition *in propria persona*. A defendant in post-conviction relief proceedings is entitled to proceed *in propria persona* if counsel can find no claims for relief to raise on his behalf. *Lammie, Montgomery*, *Rodriguez*, *supra*, and *State v. Shedd*, 146 Ariz. 5, 703 P.2d 552 (App. 1985).

RESPECTFULLY SUBMITTED this 13th day of January, 2014.

MARICOPA COUNTY PUBLIC DEFENDER

By /s/
PEG GREEN
Deputy Public Defender

Copy of the foregoing mailed/
delivered this 13th day of
January, 2014, to:

THE HONORABLE BRUCE R. COHEN
Judge of the Superior Court
Rule 32 Management Unit

DIANE MELOCHE
Deputy County Attorney

LINO ALBERTO CHAVEZ, #277926
Arizona State Prison Complex
Douglas - Mohave Unit
P.O. Box 5002
Douglas, Arizona 85608-5002

By /s/
PEG GREEN
Deputy Public Defender

KLPG011314P