

Rule 32 - The Practitioner's Basic Guide to Petitions for Post-Conviction Relief¹

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¹ Disclaimer: This Rule 32 handbook is merely meant to outline the provisions of Rule 32 of the Arizona Rules of Criminal Procedure, for the Arizona practitioner. The author's and CJS's sole intent is to provide a natural language explanation of Rule 32, along with some case citations that may be helpful. This handbook is a basic guide and should not be substituted for your own legal research or education in relation to any particular case. This handbook may be used as a starting place for your own interpretation of the Rule and relevant/recent caselaw. The State Bar of Arizona, the Criminal Justice Section, and the author assume no responsibility for any errors which may or may not be inherent in the handbook or may arise due to changes in the law. As such, practitioners should be cautioned that this handbook does not amount to legal advice or expertise, and all state bar members remain responsible for their own submission of any of Rule 32 matters.

Rule 32 Petitions for Post-Conviction Relief: A Cheat Sheet

Procedure

Appointment of Counsel

Time Limit/Details

Capital Case: As soon as the Arizona Supreme Court affirms the defendant's conviction and sentence on direct appeal.

Rule 32 of-right and non-capital cases: Upon the timely filing of the first notice, within 15 days after the request for counsel. Upon the filing of successive notices, it is within the trial court's discretion whether to appoint counsel unless the defendant is raising a claim of ineffective assistance of his post-conviction counsel.

Notice

Capital Case: The clerk of the Arizona Supreme Court will automatically file the notice upon issuance of the mandate affirming the defendant's conviction and sentence on direct appeal.

Rule 32 of-right case (most likely, the defendant has pled guilty or has admitted a probation violation): 90 days after the entry of judgment and sentence **OR** within 30 days after the issuance of the mandate by the appellate court in defendant's first Rule 32.

All other non-capital cases (most likely, the defendant has been found guilty at trial): 90 days after the entry of judgment or sentence **OR** 30 days after the issuance of the order and mandate in the defendant's direct appeal, *whichever is later*.

First Petition for Post-Conviction Relief

Capital case: 120 days from the filing of the first notice.

Length = 40 pages or less

Rule 32 of-right and non-capital cases:
Appointed counsel: 60 days from the date of appointment.

Unrepresented defendant: 60 days from the date the notice is filed **OR** from the date that the defendant's request for counsel is denied.

Length = 25 pages or less

Extensions for filing Petition for Post-Conviction Relief

Capital case: 60 days upon a showing of good cause. Additional extensions of 30 days may be granted upon a showing of good cause.

Rule 32 of-right and non-capital cases: 30 days upon a showing of good cause. Additional extensions of 30 days may be granted upon a showing of extraordinary circumstances.

Transcript Preparation

60 days from the date of the order granting the defendant's request for transcripts.

Dismissal for Non-Compliance

Defendant has 30 days to revise and return the non-complying petition. If the defendant fails to revise and return the petition within 30 days, the trial court can dismiss the proceedings with prejudice.

Response

Capital cases: Within 45 days from the

filing of the defendant's petition.

Length = 40 pages or less

Rule 32 of-right and non-capital cases:
Within 45 days from the filing of the defendant's petition.

Length = 25 pages or less

Extensions for filing Response

30 days upon a showing of good cause. Any additional extensions require that the State demonstrate extraordinary circumstances.

Reply

Capital cases: Within 15 days after the receipt of the State's response.

Length = 20 pages or less

Rule 32 of-right and non-capital cases:
Within 15 days after the receipt of the State's response.

Length = 10 pages or less

Extensions for filing a reply

Only upon a showing of extraordinary circumstances.

Summary Disposition

The trial court should review the case within 20 days following the due date for the defendant's reply. If all of the defendant's claims are procedurally precluded, the trial court can dismiss the petition. For those claims which are not procedurally precluded, the trial court will schedule a hearing within 30 days.

Amendment of pleadings

Not allowed unless good cause is shown.

Informal conference

At the trial court's discretion.

Evidentiary hearing	Within 30 days following the trial court's review of the case.
Trial court's decision	Within 10 days following the evidentiary hearing unless extraordinary circumstances are present.
Motion for Rehearing	Within 15 days of the trial court's final decision.
Response to Motion for Rehearing	No response necessary unless ordered by the trial court.
Reply to Motion for Rehearing	Only if a response is ordered by the trial court, then due within 10 days after the service of the response.
Petition for Review	Within 30 days after the trial court's final decision (filed with appellate court).

Number of copies:

(1) Arizona Supreme Court: An original and 6 copies of the Petition. An original and one copy of the appendix, if any.

(2) Arizona Court of Appeals: An original and 4 copies of the Petition. An original and one copy of the appendix, if any.

(3) Superior Court: An original and one copy of the Petition and appendix, if any.

Length = 20 pages or less, not including the appendix

Cross-Petition for Review	Within 15 days after the service of the petition for review (filed with appellate court).
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	<i>Length = 20 pages or less, not including the appendix</i>
Notice of filing Petition for Review	Within 3 days after the filing of the petition or cross-petition for review (filed with the trial court).
Response to Petition for Review	Within 30 days of the service of the petition (filed with the appellate court).
	<i>Length = 20 pages or less, not including the appendix</i>
Reply to Petition for Review	Within 10 days of service of the response (filed with the appellate court).
	<i>Length = 10 pages or less; no appendix</i>
Extensions re: Petitions for Review	Filed with and ruled upon by the trial court.
Filing of the Record re: Petitions for Review	<u>Capital cases:</u> The record is not transmitted unless the appellate court requests it.
	<u>Rule 32 of-right and non-capital cases:</u> Within 45 days of receipt of the notice of filing a petition for review.
Motion for Reconsideration of Appellate Court Decision	Within 15 days after the appellate court's decision.
	<i>Length = 15 pages or less</i>
Response to Motion for Reconsideration of Appellate Court Decision	No response necessary unless ordered.
	<i>Length = 15 pages or less</i>

Petition for Review of Appellate Court Decision

Within 30 days after the filing of the appellate court's decision **OR** within 15 days after the appellate clerk has mailed notice of the decision on a motion for reconsideration.

Length = 12 pages or less

Cross-Petition for Review of Appellate Court Decision

Within 15 days after the service of the petition for review.

Length = 12 pages or less

Response to Petition for Review

Within 30 days of service of the petition or cross-petition.

Length = 12 pages or less

Reply to Petition for Review

Not necessary unless ordered by the Court.

Rule 32.1: Scope of Remedy

What Rule 32.1 says:

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

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

Grounds for relief are:

- a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;
- b. The court was without jurisdiction to render judgment or to impose sentence;
- c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
- d. The person is being held in custody after the sentence imposed has expired;
- e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:

trial. (1) The newly discovered material facts were discovered after the

(2) The defendant exercised due diligence in securing the newly discovered material facts.

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

- f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the

defendant's part; or

g. There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; or

h. The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt or that the court would not have imposed the death penalty.

What Rule 32.1 means:

Rule 32 relief is limited to those defendants who have convicted of, or sentenced for, a criminal offense. In accordance with A.R.S. § 13-2023, no filing fee is required.

State v. Aguilar, 170 Ariz. 292, 823 P.2d 1300 (App. 1991): Rule 32 applies to criminal convictions that originate in Superior Court, justice court or municipal court, regardless of whether the defendant's conviction was for a felony or misdemeanor.

A Rule 32 of-right proceeding exists if the defendant:

- (1) pled guilty to an offense
- (2) pled no contest to an offense
- (3) admitted a probation violation
- (4) pled guilty or no contest and as a result, automatically violated probation
- (5) admitted a probation violation and as a result, probation was revoked. *See State v. Robbins*, 166 Ariz. 531, 803 P.2d 942 (App. 1991) (defendant can bring petition for post-conviction relief challenging a probation revocation when the challenge is based on the ineffective assistance of counsel.)

A defendant DOES NOT have to be in custody to file a petition for post-conviction relief pursuant to Rule 32 except under subsection (d) (“[t]he person is being held in custody after the sentence imposed has expired.”) *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549 (1968).

Right to Counsel:

Indigent defendants are **not automatically given the right to appointed counsel**, but the trial court may impose counsel when, **in the interest of justice**, appointment of counsel is necessary. *State v. Smith*, 184 Ariz. 456, 910 P.2d 1 (1996).

Any right to appointed counsel only extends to the trial court's consideration and disposition of the petition for post-conviction relief. Counsel is obligated to remain on the case until the trial court

disposes of the petition. However, in the event that appointed counsel cannot find an issue to submit for review after searching the record, counsel should inform the trial court and the defendant. The defendant will then be entitled to proceed *pro se* and may be entitled to an extension of time in which to file his petition. Counsel must still remain on the case pending the trial court's disposition of the case. Counsel's function is to assist the *pro se* defendant or the trial court should a viable issue for review be discovered. *Lammie v. Barker*, 185 Ariz. 263, 915 P.2d 662 (1996).

Grounds for Relief:

a. **The defendant's conviction was in violation of the U.S. or Arizona Constitutions** - This includes claims concerning the **denial of counsel and the ineffective assistance of counsel**. *State v. Herrera*, 183 Ariz. 642, 905 P.2d 1377 (App. 1995). *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (App. 1995), allows a subsequent petition for post-conviction relief in Rule 32 of-right cases should the defendant assert that his first Rule 32 counsel rendered the ineffective assistance of counsel.

b. The trial court was **without jurisdiction** to preside over the matter.

c. The **sentence imposed exceeded the maximum sentenced authorized by law or is illegal** - In asking for relief under this subsection, a defendant IS NOT contesting the validity of the underlying conviction.

d. The defendant is **still in custody even though the defendant's sentence has expired** - This DOES NOT encompass attacks on the conditions of imprisonment or on correctional practices or rules. Examples of arguments raised under this subsection include issues regarding the miscalculation of a sentence or questions concerning the computation of good time credits.

e. **Newly discovered material facts** which would have changed the verdict or sentence. Newly discovered evidence exists if (1) discovered after the trial; (2) the defendant acted with due diligence in securing these facts; and (3) these newly discovered material facts are not merely cumulative or used solely for impeachment.

Under this subsection, a defendant MUST act with **DUE DILIGENCE**, meaning that the defendant MUST promptly bring forth the new evidence. A defendant cannot abuse the process by waiting for a beneficial time to raise a claim of newly discovered material facts.

Example of newly discovered evidence:

State v. Orantez, 183 Ariz. 218, 902 P.2d 824 (1995): Evidence of drug use and of lying about drug use would have probably changed the verdict.

Examples of non-newly discovered evidence:

(1) *State v. Dunlap*, 187 Ariz. 441, 930 P.2d 518 (App. 1996): Not newly discovered evidence when a defendant who voluntarily chose not to testify comes forward later to offer testimony exculpating a co-defendant.

(2) *State v. Saenz*, 197 Ariz. 487, 4 P.3d 1030 (App. 2000): Not newly discovered evidence when trial court errs in granting a new trial when the defendant knew another person had allegedly confessed well before trial and did nothing to bring the evidence forward, but instead, allowed the trial to proceed.

f. It was **not the defendant's fault** that a notice of post-conviction relief or notice of appeal was not filed within the prescribed time period - This includes those situations where the trial court failed to inform the defendant of appellate rights and instances in which the defendant thought that his attorney abided by the rules in filing, but the defendant's attorney did not.

g. The **law has changed significantly** - This includes all arguments regarding the retroactive effect of constitutional and nonconstitutional legal principles.

h. Insufficient evidence

Rule 32.2: Preclusion of Remedy

What Rule 32.2 says:

a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

(1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;

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

(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under Rule 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.

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

What Rule 32.2 means:

A defendant is **unable to obtain relief** pursuant to Rule 32.2 if he could have raised the issue and failed to do so on appeal or in a motion for new trial. Thus, if the trial court or the appellate court can still consider the matter, a defendant cannot raise it in a petition for post-conviction relief. Further, a defendant will be denied relief if the issue has been finally decided on appeal or in any previous collateral proceeding or if the issue has never been raised by the defendant. *See Gerlaugh v. Lewis*, 898 F.Supp. 1388 (1995); *see also State v. Curtis*, 185 Ariz. 112, 912 P.2d 1341 (App. 1995).

Purpose of the preclusion rule: The preclusion rule requires a defendant to raise all known claims for relief in a single petition for post-conviction relief in an effort to avoid piecemeal litigation and foster judicial economy. *See State v. Rosales*, 398 Ariz.Adv.Rep. 9, 66 P.3d 1263 (App. 2003),

citing Stewart v. Smith, 202 Ariz. 446, 46 P.3d 1067 (2002) (“Rule 32.2 is a rule of preclusion designed to limit those reviews, to prevent endless or nearly endless reviews of the same case in the same trial court.”).

Rule 32.2(a)(3): **Waiver** - For claims of trial error, it is sufficient for the State to show that the defendant waived the issue by failing to raise the error at trial, on appeal, or in a previous collateral proceeding. *Stewart v. Smith*, 46 P.3d 1067 (2002).

Exceptions: A defendant cannot be precluded from raising claims for relief based on:

- (a) being held in custody after the imposed sentence has expired (Rule 32.1(d));
- (b) newly discovered material facts (Rule 32.1(e));
- (c) the failure to file a timely notice of post-conviction relief or notice of appeal was not the defendant’s fault (Rule 32.1(f));
- (d) significant change in the law that if applied to the defendant’s case, would probably overturn the defendant’s conviction or sentence (Rule 32.1(g));
- (e) insufficiency of the evidence (Rule 32.1(h)).

If a defendant raises one of these claims in a second petition for post-conviction relief or in an untimely petition for post-conviction relief, he must set forth the substance of the specific exception and his reasons for not previously raising it (for example, the defendant can raise a claim of newly discovered material facts in a second petition when that claim was not raised in his first petition because he did not know about the newly discovered material facts at the time that he filed his first petition).

If the defendant **fails to specify** the exception pursuant to which he is proceeding, the trial court can dismiss without prejudice the defendant’s notice of post-conviction relief.

Rule 32.2(c): The State’s burden for proving preclusion is **preponderance of the evidence**. However, the State does not need to argue preclusion for any court to find preclusion. **Courts can sua sponte find that a defendant’s claims are precluded.** Courts can find preclusion on their own even without requiring the State to respond. *State v. Curtis*, 185 Ariz. 112, 912 P.2d 1341 (App. 1995).

Ineffective assistance of counsel claims:

All ineffective assistance of counsel claims **MUST** be raised in petitions for post-conviction relief. Any such claims raised by direct appeal will not be addressed by appellate courts regardless of merit. *See State v. Spreitz*, 202 Ariz. 1, 39 P.3d 525 (2002).

“Where ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 post-conviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded.” *Id.*, *citing State v. Conner*, 163 Ariz. 97, 100, 786 P.2d 948, 951 (1990).

Rule 32.3: Nature of Proceedings and Relation to Other Remedies

What Rule 32.3 says:

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

What Rule 32.3 means:

All proceedings pursuant to Rule 32 are criminal in nature.

The constitutional scope of the writ of habeas corpus is not restricted by this rule.

Rule 32.4: Commencement of Proceedings

What Rule 32.4 says:

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

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

c. Appointment of Counsel.

(1) *Capital Cases.* After the Supreme Court has affirmed a defendant's conviction and sentence in a capital case, the Supreme Court, or if authorized by the Supreme Court, the presiding judge of the county from which the case originated, shall appoint counsel for the defendant pursuant to A.R.S. § 13-4041 and Rule 6.8 if the defendant is determined to be indigent. If the appointment is made by the presiding judge, a copy of the court's order appointing counsel shall be filed in the Supreme Court.

Upon the filing of a successive notice, the presiding judge shall appoint the

previous post-conviction counsel of the capital defendant unless counsel is waived or good cause is shown to appoint another qualified attorney from the list described in A.R.S. § 13-4041.

On the first notice in a capital case, appointed counsel for the defendant shall have one hundred twenty days from the filing of the notice to file a petition raising claims under Rule 32.1. A capital defendant proceeding without counsel shall have one hundred twenty days from the filing of the notice to file a petition. On the filing of a successive notice, appointed counsel, or the defendant if proceeding without counsel, shall file the petition within thirty days from the filing of the notice. On a showing of good cause, a defendant in a capital case may be granted a sixty day extension in which to file the petition. Additional extensions of thirty days may be granted for good cause.

If a petition for post-conviction relief is not filed within one hundred and eighty days from the date of appointment of counsel, or one hundred and eighty days from the date the notice is filed, or the date a request for counsel is denied if the defendant is proceeding without counsel, the defendant or counsel for the defendant shall file a notice in the Supreme Court, advising the court of the status of the proceedings. Thereafter, defendant or counsel for the defendant shall file monthly status reports in the Supreme Court until the post-conviction proceedings are concluded in the trial court.

(2) *Rule 32 of-right and non-capital cases.* Upon the filing of a timely or first notice in a Rule 32 proceeding, the presiding judge, or his or her designee, shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel is within the discretion of the presiding judge. In non-capital cases appointed counsel for the defendant shall have sixty days from the date of appointment to file a petition raising claims under Rule 32.1. On a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition. Additional extensions of thirty days shall be granted only upon a showing of extraordinary circumstances.

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

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

d. Transcript Preparation. If the transcripts of the trial court proceedings have not been previously transcribed, the defendant may request on a form provided by the clerk of court that the transcripts be prepared. The court shall expeditiously review the request and order only those transcripts prepared that it deems necessary to resolve the issues to be raised in the petition. The preparation of the transcripts shall be at county expense if the defendant is indigent. The time for filing of the petition shall be tolled from the time a request for transcripts is made until the transcripts are prepared or the request is denied. Transcripts shall be prepared and filed within sixty days of the order granting the request.

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

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

What Rule 32.4 means:

Prior to filing an actual petition for post-conviction relief, the defendant must file a notice stating that he intends to seek relief. The trial court can provide these notice forms to defendants. Rule 32.4 sets out **specific time limits**:

Filing of the Notice:

In a Rule 32 of-right proceeding: **90 days** after the entry of judgment and sentence OR **within 30 days** after the issuance of the mandate by the appellate court in the defendant's first Rule 32.

In all other non-capital cases: **90 days** after the entry of judgment and sentence OR **30 days** after the issuance of the order and mandate in the direct appeal, *whichever is later*.

State v. Jones, 182 Ariz. 432, 897 P.2d 734 (App. 1995): In non-capital cases, the notice can be filed while an appeal is pending.

State v. Pruett, 185 Ariz. 128, 912 P.2d 1357 (App. 1996): In a Rule 32 of-right proceeding, a defendant is constitutionally entitled to the effective assistance of counsel on the **first** petition for

post-conviction relief. Thus, the defendant is allowed **30 days within which to file a second notice** if the defendant seeks to challenge counsel's effectiveness in the first Rule 32.

In a capital case: The clerk of the Supreme Court will file the notice with the trial court upon the issuance of the mandate affirming the defendant's conviction and sentence on direct appeal.

If the notice is **untimely**, the defendant can only raise the following claims:

- (a) being held in custody after the imposed sentence has expired (Rule 32.1(d));
- (b) newly discovered material facts (Rule 32.1(e));
- (c) the failure to file a timely notice of post-conviction relief or notice of appeal was not the defendant's fault (Rule 32.1(f));
- (d) significant change in the law that if applied to the defendant's case, would probably overturn the defendant's conviction or sentence (Rule 32.1(g));
- (e) insufficiency of the evidence (Rule 32.1(h)).

When filing the notice, the caption from the original criminal action is used.

Notification of Appellate Court: After receiving the notice, the trial court will send a copy to the appellate court within five days if an appeal of the defendant's conviction, sentence, or both is pending with the appellate court.

Capital Cases:

Appointment of Counsel:

- If the defendant is indigent, he receives counsel as soon as the Arizona Supreme Court affirms his conviction and sentence in a capital case
- If the defendant files a successive notice, the court shall appoint the attorney who represented the defendant on his previous Rule 32 unless the defendant waives counsel or good cause is shown to appoint another qualified attorney

Time Limits for Filing the First Petition:

- Appointed counsel: **120 days** from the filing of the **first** notice
- Unrepresented defendant: **120 days** from the filing of the **first** notice

Time Limits for Filing Successive Petitions:

- Appointed counsel and unrepresented defendant: **30 days** from the filing of the **successive** notice

Extensions:

- Upon a showing of **good cause**, a defendant may be granted a **60 days** extension
- Additional extensions of **30 days** may be granted if **good cause** is demonstrated
- * After 180 days of the appointment of counsel OR the date the notice is filed OR the date a request for counsel is denied, if the petition has not been filed, counsel or the defendant must

file a notice in the Supreme Court advising the court of the status of the proceedings. These reports are due **monthly** thereafter until the Rule 32 proceedings are completed in the trial court.

Rule 32 of-right and non-capital cases:

Appointment of Counsel:

- If the defendant is indigent, upon the timely filing of the **first notice**, he receives counsel within **15 days** of the request for counsel
- Upon the filing of **successive notices**, the appointment of counsel is within the discretion of the trial court. **In a second petition for post-conviction relief, the trial court is not required to appoint counsel.** *State v. McDonald*, 192 Ariz. 44, 960 P.2d 644 (App. 1998).

Time Limits for Filing the First Petition:

- Appointed counsel: **60 days** from the date of appointment
- Unrepresented defendant: **60 days** from the date the notice is filed OR from the date that the request for counsel is denied

Extensions:

- 30 days** upon a showing of **good cause**
- Additional extensions of **30 days** will only be granted upon a showing of **extraordinary circumstances**

* Counsel must investigate the defendant's case for any and all colorable claims. If counsel believes that none exist, counsel must file a notice of this determination with the trial court. Counsel then acts as advisory counsel until the trial court's final determination. When the trial court receives such a notice, the defendant receives an extension of **45 days from the date that the notice is filed** to file his own petition. Additional extensions of **45 days** will only be granted upon a showing of **extraordinary circumstances**.

Transcript Preparation:

- The defendant may request that transcripts be prepared
- The trial court will review the defendant's request for transcripts and then determine which transcripts need preparing so that the issues raised in the petition can be resolved
- If the defendant is indigent, the preparation of the transcripts shall be at county expense
- Excluded time: The time between the filing of the request for transcripts and the preparation of transcripts OR their denial, shall be tolled
- Time limits for preparing and filing transcripts: **60 days** from the date of the order granting the request

Assignment of Judge:

- The Rule 32 proceedings will be assigned to the sentencing judge unless his testimony will be relevant. If the sentencing judge's testimony will be relevant, then the case will be transferred to

another judge.

Stay of Execution of Death Sentence: Notification by Supreme Court:

-Execution is automatically stayed until the **first** petition for post-conviction relief is resolved. There is no automatic stay of execution following the filing of a **successive petition** unless the defendant files a separate application for a stay with the Supreme Court, noticing those issues not precluded under Rule 32.2.

Rule 32.5: Contents of Petition

What Rule 32.5 says:

The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, and certify that he or she has done so. Facts within the defendant's personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available to the defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required. In Rule 32 of-right and non-capital cases, the petition shall not exceed 25 pages. The response shall not exceed 25 pages, and any reply shall not exceed 10 pages. In capital cases, the petition shall not exceed 40 pages. The response shall not exceed 40 pages, and any reply shall not exceed 20 pages. A petition which fails to comply with this rule shall be returned by the court to the defendant for revision with a minute entry specifying how the petition fails to comply with the rule. A petition that has been revised to comply with the rule shall be returned by the defendant for refiling within 30 days after defendant's receipt of the non-complying petition. If the petition is not so returned, the court shall dismiss the proceedings with prejudice. The period for response by the state shall begin on the date a returned petition is refiled.

What Rule 32.5 means:

*** Include all grounds for relief.**

* If facts are within the defendant's personal knowledge, the defendant must note this separately and attest to it under oath.

* All supporting documentation, including affidavits, must be attached to the petition.

* A memorandum of points and authorities, including citations to the record and the law are required.

Length of the Petition:

Non-capital cases:

Petition = 25 pages or less

Response = 25 pages or less

Reply = 10 pages or less

Capital cases:

Petition = 40 pages or less

Response = 40 pages or less

Reply = 20 pages or less

Noncompliance: A petition which does not comply with these rules will be returned with a minute entry specifying how the petition does not comply. The defendant has **30 days** following the receipt of the non-complying petition in which to revise and return the petition. If the defendant fails to revise and return the petition within 30 days, the trial court can **dismiss the proceedings with prejudice.**

Rule 32.6: Additional Pleadings; Summary Disposition; Amendments

What Rule 32.6 says:

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

b. Defendant's Reply. Within fifteen days after receipt of the response, the defendant may file a reply. Extensions shall be granted only upon a showing of extraordinary circumstances.

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

If a hearing is ordered, the state shall notify the victims, upon the victims' request pursuant to statute or court rule relating to victims' rights, of the time and place of the hearing.

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

What Rule 32.6 means:

Time Limits for Filing Response:

-45 days from the filing of the defendant's petition

Extensions:

-30 days upon a showing of **good cause**

-For any additional extensions, the State must demonstrate **extraordinary circumstances**

Time Limits for Filing Reply:

-Within **15 days** after the receipt of the State's response

Extensions:

-Extensions will only be granted if the defendant can show **extraordinary circumstances**

Summary Disposition: Within 20 days after the due date of the defendant's reply, the trial court should review the petition and additional case materials and determine which claims are procedurally precluded. If the trial court determines that all claims are **procedurally precluded**, then the trial court can **dismiss the petition**. If the trial court does not dismiss the petition, it should set a **hearing within 30 days** on those claims which are not precluded.

State v. Curtis, 185 Ariz. 112, 912 P.2d 1341 (App. 1995): A trial court has the discretion to dismiss a defendant's petition on the grounds of preclusion before receiving the State's response.

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963): Requires that if the trial court finds any colorable claim, it must make a full factual determination before deciding the petition on its merits.

Amendment of Pleadings: Pleadings cannot be amended unless **good cause** is shown.

Rule 32.7: Informal Conference

What Rule 32.7 says:

The court may at any time hold an informal conference to expedite the proceeding. The defendant need not be present if the defendant is represented by counsel who is present.

What Rule 32.7 means:

At its discretion, the trial court can hold an informal conference at any time with the defendant and/or defense counsel present.

Rule 32.8: Evidentiary Hearing

What Rule 32.8 says:

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

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

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

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

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

What Rule 32.8 means:

A defendant is entitled to an **evidentiary hearing** if issues of material fact are present.

Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963): The defendant's presence is required at the evidentiary hearing, and the defendant has the right to subpoena witnesses to appear on his behalf.

Burden of Proof:

The defendant has the burden of proving the allegations of fact by a preponderance of the evidence. If a constitutional defect is proven, the State has the burden of proving that it was harmless beyond a reasonable doubt.

Decision:

The trial court should rule within **10 days** after the evidentiary hearing unless in extraordinary circumstances it needs additional time. If the trial court rules in the defendant's favor, it should issue a specific minute entry, including information concerning the next procedural step. Additionally, the trial court must render specific findings of law and fact, but may do so orally or in writing.

Transcript:

If a party requests a transcript of the evidentiary hearing within the time limits provided for filing a petition for review, the trial court can order that a transcript be prepared. If the defendant is indigent, the transcript is prepared at indigent expense.

Rule 32.9: Review

What Rule 32.9 says:

a. Motion for Rehearing; Response; Reply. Any party aggrieved by a final decision of the trial court in these proceedings may, within fifteen days after the ruling of the court, move the court for a rehearing setting forth in detail the grounds wherein it is believed the court erred. No response to a motion for rehearing will be filed unless requested by the court, but a motion for rehearing will not be granted in the absence of such a response. A reply, if any, shall be filed within 10 days after the service of the response. The filing of a motion for rehearing in the trial court is not a prerequisite to the filing of a petition for review pursuant to paragraph (c) of this rule.

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

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

1. *Form and contents.* The petition or cross-petition for review shall comply with the form requirements of Rule 31.12 of the rules of criminal appellate procedure and contain a caption setting forth the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number and a brief descriptive title. An original and 6 copies of the petition and an original and one copy of the appendix, if any, shall be

filed if review is being sought in the Supreme Court. An original and 4 copies of the petition and an original and one copy of the appendix, if any, shall be filed if review is being sought in the Court of Appeals. An original and one copy shall be filed if review is being sought in the superior court. The parties shall be designated as in the trial court proceedings. The petition or cross-petition shall not exceed 20 pages, exclusive of the appendix, shall not have a cover or be bound, but shall be fastened with a single staple in the upper left corner, and shall contain the following:

(i) Copies of the trial court's rulings entered pursuant to rules 32.6(c), 32.8(d), and 32.9(b).

(ii) The issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review.

(iii) The facts material to a consideration of the issues presented for review.

(iv) The reasons why the petition should be granted. In capital cases all references to the record in the trial court shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices. If the appendices exclusive of the trial court's rulings exceed 15 pages in length, such appendices shall be fastened together separately from the petition and the copies of the trial court's rulings.

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

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

2. Service; Response; Reply. The petitioner or cross-petitioner shall serve a copy of the petition or cross-petition on the adverse party. A response may be filed within 30 days from the date upon which the petition or cross-petition is served. The response shall comply with the form requirements of Rule 32.9(c)(1) and shall not exceed 20 pages, exclusive of any appendix. Appendices shall conform to the requirements of Rule 32.9(c)(1). A reply, if any, may be filed within 10 days after the service of a response. The reply shall also comply with the form requirements of Rule 32.9(c)(1). The reply shall be limited to matters addressed in the response and shall not exceed 10

pages. No appendices shall be submitted with a reply.

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

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

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

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

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

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

What Rule 32.9 means:

Motions for Rehearing:

Any party whom the trial court rules against can file a **motion for rehearing** within **15 days** of the trial court's final decision. No response is necessary unless ordered by the trial court. However, a motion for rehearing will not be granted in the absence of the trial court ordering that a response be filed. If a response is ordered, **the reply, if any**, must be filed within **10 days** after the service of the

response. Any party can file a petition for review without having filed a motion for rehearing. When Motions for Rehearing are Granted: If the trial court grants the motion for rehearing, then it may either amend its original ruling without a hearing or grant a new hearing and then amend or reaffirm its previous ruling. If the trial court amends its previous ruling, then it needs to set forth its reasons for doing so.

Petition for Review:

Right to Counsel:

State v. Smith, 184 Ariz. 456, 910 P.2d 1 (1996): There is **no right to counsel** because review of the denial of post-conviction relief is discretionary.

Time Limits:

- Petition for Review: Within **30 days** after the trial court's final decision (filed with the appellate court)
- Cross-Petition for Review: Within **15 days** after the service of the Petition for Review (filed with the appellate court)
- Notice of filing with the trial court: Within **3 days** after filing the Petition or Cross-Petition for Review (filed with the trial court). The Notice may include a designation of the record adding any materials that are material to the issues raised in the Petition for Review.
- Response: Within **30 days** of service of the Petition
- Reply: Within **10 days** of service of the Response

Extensions:

- Shall be filed with and ruled upon by the trial court

Other Motions (excluding motions for extension of time):

- Any other motions should be filed in the court in which the Petition for Review is filed.

Number of copies if review is being sought in:

- Supreme Court: An original and 6 copies of the Petition. An original and one copy of the appendix, if any.
- Court of Appeals: An original and 4 copies of the Petition. An original and one copy of the appendix, if any.
- Superior Court: An original and one copy of the Petition and appendix, if any.

Page Limits:

- Petition/Cross-Petition: **Less than 20 pages**, not counting the appendix
- Response: **Less than 20 pages**, not counting the appendix
- Reply: **Less than 10 pages**; no appendix

Must Include:

- (1) Copies of the trial court's ruling
- (2) Statement of the issues
- (3) Statement of material facts
- (4) Reasons why the Petition should be granted. **In capital cases**, citations to the appendix must be included. If the appendix, exclusive of the trial court's ruling, **exceeds 15 pages**, the appendix should be filed separately from the Petition and the copies of the trial court's ruling. **In other Rule 32 cases, an appendix is not required, but citations to the record are required.**

*** IMPORTANT: "Failure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue."**

State v. French, 198 Ariz. 119, 7 P.3d 128 (App. 2000): A defendant's petition for review which fails to comply with the rules and can be rejected by the appellate court when the defendant simply refers to the memoranda filed below.

Stay pending review: If the State files a motion for rehearing or a petition for review, then an order granting a new trial is stayed. For any other relief granted to the defendant, the trial or appellate court has discretion whether to grant a stay.

Filing of the record:

Time limits:

- In capital cases: The record is not transmitted to the appellate court unless the appellate court requests it.
- In all other Rule 32s: The record is transmitted to the appellate court within 45 days after the receipt of the notice of filing of a petition for review.

Disposition when Petition granted: With or without oral argument, the appellate court may, in its discretion, grant review. If review is granted, then the appellate court can issue an order and grant relief as its deems necessary and proper.

Reconsideration and review of appellate court decision: Refers you to Rules 31.18 and 31.19 of the Arizona Rules of Criminal Procedure.

Basically, a **motion for reconsideration** must be filed within **15 days** after the appellate court's decision. No response is necessary unless ordered by the appellate court. Neither the motion nor the response can be longer than **15 pages**.

If a party desires review by the Arizona Supreme Court, a **petition for review** must be filed within **30 days** after the filing of the appellate court's decision OR within **15 days** after the appellate clerk has mailed notice of the decision on a motion for reconsideration. A cross-petition may be filed within **15 days** after service of the petition for review. A response must be filed within 30 days of service of the petition or cross-petition. The petition and the response should not exceed **12 pages**, not including the appendix and the attached lower court decisions. No reply is necessary unless

ordered by the Court.

Rule 32.10: Extensions of time

What Rule 32.10 says:

In any capital case, in ruling on any request for an extension of a time limit set in this rule, the court shall consider the rights of the defendant and any victim to prompt and final resolution of the case.

What Rule 32.10 means:

The trial court must consider the rights of the defendant and any victim(s) when ruling on a request for an extension of time in a capital case. Victims are entitled to prompt and final conclusions of the case so victims are permitted to file a statement with the court regarding their position on the request for the extension of time or have the State communicate their position to the court.