

Chapter 5

Arizona

- § 5:1 Summary of postconviction remedies in Arizona
- § 5:2 Arizona Rule of Criminal Procedure 32
- § 5:3 —Criminal action
- § 5:4 —Right to counsel
- § 5:5 —Claims precluded
- § 5:6 —Rule 32.1: Grounds for relief
- § 5:7 ——Text of Rule 32.1
- § 5:8 ——32.1(a): Constitutional violation—Ineffective assistance of counsel
- § 5:9 ———Case law
- § 5:10 ———Incompetency of petitioner
- § 5:11 ———Involuntary guilty plea—Case law
- § 5:12 ———Conviction or sentence otherwise violates the U.S. Arizona Constitutions—Case law
- § 5:13 ——32.1(b): Lack of jurisdiction
- § 5:14 ——32.1(c): Excessive sentence
- § 5:15 ———Case law
- § 5:16 ——32.1(d): Continued custody after expiration of sentence
- § 5:17 ———Case law
- § 5:18 ——32.1(e): Newly discovered evidence
- § 5:19 ———Case law
- § 5:20 ——32.1(f): Defendant's failure to file notice of postconviction relief not fault of defendant
- § 5:21 ———Case law
- § 5:22 ——32.1(g): Significant change in the law—Case law
- § 5:23 ——32.1(h): Clear and convincing evidence that facts underlying claim would be sufficient to establish that no reasonable fact-finder would find defendant guilty
- § 5:24 —Text of Rule 32.2: Preclusion of Remedy
- § 5:25 —Case law
- § 5:26 —Rule 32.3: Transfer under Arizona Rule of Criminal Procedure
- § 5:27 —Text of Rule 32.3
- § 5:28 —Rule 32.4—Filing
- § 5:29 —Text of Rule 32.4
- § 5:30 —Case law

- § 5:31 —Text of Rule 32.5: Contents of Petition
- § 5:32 —Text of Rule 32.6: Additional Pleadings
- § 5:33 —Text of Rule 32.7: Informal Conference
- § 5:34 —Text of Rule 32.8
- § 5:35 — —Rule 32.8: Evidentiary hearings
- § 5:36 — — —Case law
- § 5:37 —Appeals
- § 5:38 — —Text of Rule 32.9
- § 5:39 —Text of Rule 32.10: review of intellectual disability determination
- § 5:40 —Text of Rule 32.11
- § 5:41 Writ of habeas corpus under Arizona Statutes §§ 13-4121 et seq.
- § 5:42 Writ of habeas corpus under Arizona Statutes §§ 13-4121 et seq—Arizona Rule of Criminal Procedure 32 and habeas corpus relief
- § 5:43 —Case law
- § 5:44 Motion to vacate judgment under Arizona Rule of Criminal Procedure 24.2
- § 5:45 —Text
- § 5:46 —Case law
- § 5:47 Motions to correct unlawful sentence or to correct a sentence imposed in an unlawful manner under Arizona Rule of Criminal Procedure 24.3
- § 5:48 —Text
- § 5:49 Motion to correct clerical error under Arizona Rule of Criminal Procedure 24.4
- § 5:50 —Text
- § 5:51 —Case law
- § 5:52 Special actions under Arizona Rule of Special Action 1(a)
- § 5:53 —Text
- § 5:54 —Habeas corpus
- § 5:55 —Grounds for relief—Limited review of actions by the Arizona Board of Pardons and Paroles
- § 5:56 — —Unlawful actions of prison officials
- § 5:57 — —Used to attack certain decisions of convicting court
- § 5:58 — —Other grounds for relief
- § 5:59 Writ of error coram nobis
- § 5:60 Postconviction DNA testing statute under Arizona Statutes § 13-4240
- § 5:61 —Text
- § 5:62 Erroneous Convictions Act

KeyCite®: Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

§ 5:1 Summary of postconviction remedies in Arizona

Principal postconviction remedy:

Rule 32, Ariz. R. Crim. Proc., remedy. This remedy is applied for in the convicting court. The remedy is not an independent civil action but a postsentencing phase of the original criminal case. The remedy is authorized by a judicially promulgated court rule. There is no custody requirement in Rule 32 proceedings. Newly discovered evidence of innocence is a ground for relief under Rule 32.

Right to counsel:

There is a right to counsel in Rule 32 proceedings. Furthermore, a guilty-pleading defendant in a noncapital case is entitled to the effective assistance of counsel on his or her first petition for postconviction relief.

Statute of limitations:

In a Rule 32 of-right proceeding, the proceeding must be instituted within 90 days after the entry of judgment and sentence or within 30 days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for postconviction relief proceeding. In all other noncapital cases, the Rule 32 proceeding must be instituted within 90 days after the entry of judgment and sentence or within 30 days after the issuance of the order and mandate in the direct appeal, whichever is the later. In a death sentence case, the clerk of the Supreme Court automatically and expeditiously takes the steps necessary to institute the Rule 32 proceeding once the mandate has issued affirming the defendant's conviction and sentence on direct appeal.

Secondary postconviction remedies:

- Habeas corpus
- Motion to vacate judgment
- Motion to correct unlawful sentence
- Motion to correct sentence imposed in an unlawful manner
- Motion to correct clerical error
- Special action

Other remedies:

Coram nobis is no longer an available postconviction remedy in Arizona.

Arizona has a postconviction DNA testing statute, enacted in 2000.

Arizona does not have an erroneous convictions act.

Helpful readings:

(1) Orenstein, Shaken to the Core: Emerging Scientific Opinion and Post-Conviction Relief in Cases of Shaken Baby Syndrome, 42 Ariz. St. L.J. 1305 (2011)

(2) Wolitz, Innocence Commissions and the Future of Post-Conviction Review, 52 Ariz. L. Rev. 1027 (2010)

(3) Comments on Rule 32, Ariz. R. Crim. Proc., in Ariz. Rev. Stat. Ann., vol. 17, pp. 60 et seq. (Supp. 2003)

(4) Arizona Supreme Court Review, 35 Ariz. St. L.J. 311, 450-53 (2003)

§ 5:2 Arizona Rule of Criminal Procedure 32

The principal postconviction remedy in Arizona is the judicially promulgated remedy authorized by Rule 32, Ariz. R. Crim. Proc. See also Ariz. Rev. Stat. Ann. §§ 13-4231 through 13-4239 (1984 statute, amended in 1992, 1995, 1996, 1998, and 2007, that regulates Rule 32 proceedings); Ariz. Rev. Stat. Ann. §§ 13-4041 (providing for appointment and compensation of attorneys appointed to represent Rule 32 petitioners), 13-4013 (providing for appointment and compensation of investigators and expert witness for defendants in capital cases); Rule 17.2, Ariz. R. Crim. Proc. (before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him or her of and determining that he or she understands that by pleading guilty or no contest in a noncapital case the defendant will waive the right to have the appellate courts review the proceedings by way of direct appeal, and may seek review only by filing a petition for postconviction relief pursuant to Rule 32 and, if denied, a petition for review); Rule 6.8, Ariz. R. Crim. Proc. (establishing standards for appointment of counsel for indigent defendants in all stages of capital litigation, including postconviction proceedings).

One other state, Alabama, has modeled its principal postconviction remedy (Rule 32, Ala. R. Crim. Proc.) after Rule 32, Ariz. R. Crim. Proc.

As originally promulgated by the Arizona Supreme Court in 1973, the Rule 32 remedy was based in significant part on the 1968 ABA postconviction standards and the 1966 version of the UCPA. See, e.g., Comment on Rule 32.1, Ariz. R. Crim. Proc., in Ariz. Rev. Stat. Ann., vol. 17, p. 326 (1998).

Since 1973 the Arizona Supreme Court has amended Rule 32

number of times. As a result of these revisions, there are now a number of significant restrictions on the availability of the remedy which were absent when Rule 32 was adopted in 1973. For example, whereas it used to be that a Rule 32 petition could be filed at any time, Rule 32 now contains a statute of limitations.

As a result of *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995), opinion supplemented, 182 Ariz. 118, 893 P.2d 1281 (1995), Arizona now distinguishes “of-right” Rule 32 proceedings from all other Rule 32 proceedings. See also *State v. Ward*, 211 Ariz. 158, 118 P.3d 1122 (Ct. App. Div. 1 2005) (for defendants who plead guilty, a Rule 32 proceeding for postconviction relief is the only means available for exercising the constitutional right to appellate review; the right to petition for postconviction relief cannot be waived merely by a plea or admission; although a “Rule 32 of-right” proceeding is a postconviction relief proceeding, it is the functional equivalent of a direct appeal). Generally, an “of-right” Rule 32 proceeding is a Rule 32 proceeding filed in behalf of a person who pleaded guilty, who was not entitled to a direct appeal because of the plea, and who uses Rule 32 as the only means available for exercising his state constitutional right to appellate review. Under a 2000 amendment to Rule 32, Rule 32.1 now provides in part: “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 postconviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding.” Those found guilty after a Rule 32 of-right trial retain the right to appeal. *State v. Regenold*, 226 Ariz. 378, 249 P.3d 337 (2011).

The remedy authorized by Rule 32 is in the nature of coram nobis, and is available in the superior court, which almost always will have been the convicting court. In some circumstances the superior court may not have been the court that convicted the Rule 32 petitioner.

A challenge to the protocol to be used during a lethal injection must be made by petition filed pursuant to Arizona Rule of Criminal Procedure 32. *State v. Kuhs*, 223 Ariz. 376, 224 P.3d 192 (2010).

§ 5:3 Arizona Rule of Criminal Procedure 32—Criminal action

A Rule 32 proceeding is part of the original criminal case, not a separate civil action. Ariz. Rev. Stat. Ann. § 13-4234(A); Rule 32.3, Ariz. R. Crim. Proc. A Rule 32 proceeding shall be assigned to the sentencing judge where possible. Ariz. Rev. Stat. Ann. § 13-4234(I); Rule 32.4(e), Ariz. R. Crim. Proc.

The model form of petition for postconviction relief under Rule 32 is contained in Form 25, Ariz. R. Crim. Proc.

The time limitations on applying for Rule 32 relief are set forth in Rule 32.4(a), Ariz. R. Crim. Proc.; see also Ariz. Rev. Stat. Ann. § 13-4234(C), (D), (E). Under Rule 32 itself, in a Rule 32 of-right proceeding, the notice of postconviction relief must be filed within 90 days after the entry of judgment and sentence or within 30 days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for postconviction relief proceeding. In all other noncapital cases, the notice of postconviction relief must be filed within 90 days after the entry of judgment and sentence or within 30 days after the issuance of the order and mandate in the direct appeal, whichever is the later. In a death sentence case, the clerk of the Supreme Court shall expeditiously file a notice for postconviction relief with the trial court upon the issuance of a mandate affirming the defendant's conviction and sentence on direct appeal. Any notice of postconviction relief not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).

§ 5:4 Arizona Rule of Criminal Procedure 32—Right to counsel

There is a right to counsel in Rule 32 proceedings. See, e.g., *Isley v. Arizona Dept. of Corrections*, 383 F.3d 1054 (9th Cir. 2004) (Arizona guarantees a right to counsel for all first-time Rule 32 petitioners and provides for the appointment of counsel where the petitioner is indigent, Rule 32.4(c), Ariz. R. Crim. Proc.). If the Rule 32 petitioner is under a death sentence, his or her right to counsel is secured by (1) Rule 32.4(c)(1), Ariz. R. Crim. Proc., (2) Ariz. Rev. Stat. Ann. § 13-4041(B) (after the supreme court has affirmed a defendant's conviction and sentence in a capital case, the state supreme court, or if authorized by the state supreme court, the presiding judge of the county from which the case originated shall appoint counsel to represent the capital defendant in the state postconviction relief proceeding), and (3) Ariz. Rev. Stat. Ann. § 13-4234(D) (all indigent state prisoners under a capital sentence are entitled to the appointment of counsel to represent them in state postconviction proceedings; a competent indigent defendant may reject the offer of counsel with an understanding of its legal consequence; on successive notice in capital cases, the trial court shall appoint the previous postconviction relief counsel of the capital defendant unless counsel is waived pursuant to Ariz. Rev. Stat. Ann. § 13-4041(D) or good cause exists to appoint another qualified attorney pursuant to § 13-4041(B)). Payment of compensation for attorneys appointed to represent Rule 32 petitioners sentenced

death is authorized by Ariz. Rev. Stat. Ann. § 13-4041(A), (E), (F), (G), and (H), and both Ariz. Rev. Stat. Ann. § 13-4041(B), (C), and Rule 6.8, Ariz. R. Crim. Proc., establish standards for appointment of counsel for indigent defendants in all stages of capital litigation, including postconviction proceedings. The right to counsel of a Rule 32 petitioner not under a death sentence is secured by Rule 32.4(c)(2), Ariz. R. Crim. Proc. Payment of compensation for private attorneys appointed to represent postconviction relief petitioners is authorized by Rule 6.7, Ariz. R. Crim. Proc.

See also Ariz. Rev. Stat. Ann. § 13-4041, enacted in 1996 and amended in 1998, provides a funding mechanism for indigent representation in capital postconviction proceedings; the statute was a direct response to Chapter 154 of Title 28 of the U.S. Code (28 U.S.C.A. §§ 2261 through 2266), enacted in 1996, which is designed to significantly shorten the length of federal habeas corpus proceedings; Rule 6.8, Ariz. R. Crim. Proc. was promulgated in 1996 by the Arizona Supreme Court in response to the enactment of Ariz. Stat. Ann. § 13-4041; Rule 6.8(c) deals specifically with the qualifications for appointed counsel in postconviction relief proceedings in death sentence cases.

In addition to the right to appointed counsel that Rule 32 petitioners enjoy under court rule and statutory law, the Arizona courts have held that a Rule 32 petitioner who pleaded guilty in a noncapital case has a constitutional right to the effective assistance of counsel on his or her first Rule 32 petition for postconviction relief. *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (Ct. App. Div. 1 1995).

§ 5:5 Arizona Rule of Criminal Procedure 32—Claims precluded

Generally, a Rule 32 petition is precluded if the claim for relief (1) is still raisable on direct appeal or on a posttrial motion under Rule 24, Ariz. R. Crim. Proc., (2) was finally adjudicated on the merits on direct appeal or in any previous collateral proceeding, or (3) has been waived at trial, on appeal, or in any previous collateral proceeding. Rule 32.2, Ariz. R. Crim. Proc. However, Rule 32.2(a) "shall not apply to claims for relief based on Rules 32.1(d) [relating to petitioners held in custody after the sentence has expired], (e) [relating to newly discovered evidence], (f) [relating to excusable failures to appeal], (g) [relating to retroactive changes in law that would probably overturn the conviction or sentence] and (h) [relating to the defendant demonstrating that by clear and convincing evidence that no reasonable factfinder would have found the defendant guilty, or that the court would not have imposed the death sentence]." Rule 32.2(b), Ariz. R. Crim. Proc.

"When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely postconviction relief proceeding, the notice of postconviction 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." Rule 32.2(b), Ariz. R. Crim. Proc.

"The state shall plead and prove any ground of preclusion by a preponderance of the evidence. Though the state has the burden to plead and prove grounds of preclusion, any court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion." Rule 32.2(c), Ariz. R. Crim. Proc.

§ 5:6 Arizona Rule of Criminal Procedure 32—Rule 32.1: Grounds for relief

The grounds for relief in Rule 32 proceedings are set forth in Rule 32.1, Ariz. R. Crim. Proc. The grounds for relief set forth in Rule 32.1 are intended to "encompass all the grounds presently available in Arizona" under the writ of habeas corpus, the common law writ of error coram nobis, the motion for new trial based on newly discovered evidence, the motion for relief from a final judgment, and the motion for a delayed appeal. Ariz. R. Crim. Proc. Rule 32.1 comment. The Rule 32 remedy therefore "displaces and incorporates all trial court, post-trial remedies except post-trial motions and habeas corpus." Rule 32.3, Ariz. R. Crim. Proc.

Rule 32.1 permits a defendant who "admits a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest" to file a petition for postconviction relief. *State v. Regenold*, 226 Ariz. 378, 249 P.3d 337 (2011).

§ 5:7 Arizona Rule of Criminal Procedure 32—Rule 32.1: Grounds for relief—Text of Rule 32.1

Rule 32 provides:

Rule 32.1. Scope of remedy

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 postconviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding.

Grounds for relief are:

a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;

b. The court was without jurisdiction to render judgment or to impose sentence;

c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

d. The person is being held in custody after the sentence imposed has expired;

e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:

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

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

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

f. The defendant's failure to file a notice of postconviction 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.

§ 5:8 Arizona Rule of Criminal Procedure 32—Rule 32.1: Grounds for relief—32.1(a): Constitutional violation— Ineffective assistance of counsel

Under Rule 32.1(a), relief is available if the conviction or the

sentence is in violation of the U.S. Constitution or the state constitution. In Rule 32 proceedings relief may be granted under Rule 32.1 if the convicted person was denied a federal or Arizona constitutional right.

**§ 5:9 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(a): Constitutional violation—
Ineffective assistance of counsel—Case law**

For case law on Rule 32 relief for ineffective assistance of counsel, see e.g., *Martinez v. Ryan*, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) (in Arizona, ineffective trial counsel claims may be raised only in state collateral proceedings. *State v. Allen*, 223 Ariz. 125, 220 P.3d 245 (2009) (stipulations to facts combined with “not guilty” pleas are “simply not equivalent to a guilty plea for Boykin (requiring colloquy) purposes, even if the stipulation is to all elements necessary to a conviction and even if it might appear to a reviewing court that the stipulation serves little purpose; to the extent a defendant claims that his lawyer failed to obtain the client’s informed consent to a stipulation, failed to adequately explain a stipulation, or suggested a stipulation that proved to be unwise, such claims require evidence outside the record for resolution and therefore must be raised in a Rule 32 proceeding); *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 153 P.3d 1040 (2007) (judicial economy is better served by reserving ineffective assistance of counsel claims for Rule 32 proceedings in the first instance; a defendant may bring ineffective assistance of counsel claims only in a Rule 32 postconviction proceeding—not before trial, at trial, or on direct review); *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006) (with assistance of new counsel, defendant filed second petition for postconviction relief, alleging that state failed to present sufficient evidence on causation element of felony murder conviction, and that her appellate counsel was ineffective for failing to raise this challenge on direct appeal; we granted review to consider whether Rule 32.2.(a)(3) precludes defendant Donna Jean Bennett’s claim of ineffective assistance of appellate counsel and, if it does not, whether Bennett has stated a colorable claim; Bennett bases her ineffective assistance of counsel claim on appellate counsel’s failure to challenge the sufficiency of the evidence on the causation element of her felony murder conviction; we hold that Bennett’s claim is not precluded and that she has stated a colorable claim of ineffective assistance of appellate counsel, as a general rule, when ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 postconviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded; we have previously noted, however, that it is improper for appellate counsel to argue his own in-

effectiveness at trial because the standard for determining whether counsel was reasonably effective is an objective standard which we feel can best be developed by someone other than the person responsible for the conduct; the same principles apply when post-conviction relief counsel might argue his own ineffectiveness on direct appeal; it is as difficult for postconviction relief counsel to objectively review his own performance on direct appeal and to argue any inadequacies in that performance on behalf of his client as it is for appellate counsel to argue his own ineffectiveness at trial; here, Bennett’s first postconviction relief petition did not raise the issue of ineffective assistance of appellate counsel; normally, such a claim would now be precluded; in this case, however, post-conviction relief counsel could have raised the claim only by asserting his own ineffectiveness in failing to challenge the sufficiency of the evidence on the causation issue; as our case law makes clear, such an argument is improper; we note that as long as the courts appoint the same attorney to represent a defendant in both his or her direct appeal and postconviction relief petition and suspend the appeal to permit the court to consider it with the petition, the defendant will never be able to raise ineffective assistance of appellate counsel claims in the original postconviction relief petition; for the foregoing reasons, we conclude that the second postconviction relief petition, in which Bennett was represented by different counsel, was the first proceeding in which she could raise the ineffective assistance of appellate counsel argument; therefore, Rule 32.2.(a)(3) does not preclude Bennett’s ineffective assistance of counsel claim); *State v. Jackson*, 209 Ariz. 13, 97 P.3d 113 (Ct. App. Div. 2 2004) (Jackson did not argue that his attorney had failed to accurately convey the positive and negative aspects of entering into a plea agreement the state had offered rather than proceeding with a trial and that he is therefore entitled to reinstatement of that plea offer; in fact, Jackson concedes, at least implicitly, that he knowingly and intelligently rejected any such plea offer and instead proceeded to trial because the victim had recanted; Jackson claims he is entitled to postconviction relief because of his attorney’s alleged ineffectiveness in failing to resume plea negotiations on the eve of trial, after it became apparent that the victim would in fact testify against him); *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007) (in *State v. Pruett*, 185 Ariz. 128, 912 P.2d 1357 (Ct. App. Div. 1 1995)), the Arizona Court of Appeals held that, in contrast to other indigent defendants proceeding under Rule 32, Ariz. R. Crim. Proc., indigent plea-convicted defendants seeking of-right review are constitutionally entitled to the effective assistance of counsel).

**§ 5:10 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(a): Constitutional
violation—Incompetency of petitioner**

Rule 32 provides for postconviction relief if a petitioner has pleaded guilty when he or she was incompetent.

**§ 5:11 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(a): Constitutional
violation—Involuntary guilty plea—Case law**

Rule 32.1 provides for relief where the guilty plea was involuntary. For case law, see e.g., *State v. Rubiano*, 214 Ariz. 184, 150 P.3d 271 (Ct. App. Div. 2 2007) (we reject petitioner's claim that the factual basis for his guilty plea was insufficient because, inter alia, there was no evidence of the corpus delicti independent of his admissions at the change-of-plea proceeding; the corpus delicti rule is inapplicable in the context of a guilty plea); *State v. Rubiano*, 214 Ariz. 184, 150 P.3d 271 (Ct. App. Div. 2 2007) (we reject petitioner's claim that the factual basis for his guilty plea was insufficient because, inter alia, there was no evidence of the corpus delicti independent of his admissions at the change-of-plea proceeding; the corpus delicti rule is inapplicable in the context of a guilty plea); *State v. Ward*, 211 Ariz. 158, 118 P.3d 1122 (Ct. App. Div. 1 2005) (for defendants who plead guilty, a Rule 32 proceeding for postconviction relief is the only means available for exercising the constitutional right to appellate review; the right to petition for postconviction relief cannot be waived merely by a plea or admission; although a "Rule 32 of-right" proceeding is a postconviction relief proceeding, it is the functional equivalent of a direct appeal); *Canion v. Cole ex rel. County of Maricopa*, 208 Ariz. 133, 91 P.3d 355 (Ct. App. Div. 1 2004), opinion vacated on other grounds, 210 Ariz. 598, 115 P.3d 1261 (2005) (in Arizona, the appeal is the postconviction proceeding of primary importance; the right to appeal is guaranteed by our state constitution, Ariz. Const. art. 2, § 24, but the Rule 32 procedure is not; Rule 32 is separate and apart from the right to appeal, and it is not designed to afford a second appeal; nonetheless, Rule 32 proceedings are critical because, while an appeal is designed to give prompt, full appellate review to those who have grounds to believe they have not had a fair trial, Rule 32 is designed to accommodate the unusual situation where justice ran its course and yet went awry); *State v. Ward*, 211 Ariz. 158, 118 P.3d 1122 (Ct. App. Div. 1 2005) (for defendants who plead guilty, a Rule 32 proceeding for postconviction relief is the only means available for exercising the constitutional right to appellate review; the right to petition for postconviction relief cannot be waived merely

by a plea or admission; although a "Rule 32 of-right" proceeding is a postconviction relief proceeding, it is the functional equivalent of a direct appeal).

**§ 5:12 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(a): Constitutional
violation—Conviction or sentence otherwise violates
the U.S. Arizona Constitutions—Case law**

For case law on a conviction or sentence violating a constitution, see e.g., *State v. Swoopes*, 216 Ariz. 390, 166 P.3d 945 (Ct. App. Div. 2 2007) (mere assertion by defendant that his or her right to fair trial has been violated is not a claim of sufficient constitutional magnitude for purposes of postconviction relief statute relating to preclusion of remedy under Rule 32.2; to avoid preclusion, a defendant must show a constitutional right is implicated, one that can only be waived by a defendant personally; however, not all error that is fundamental involves the violation of a constitutional right that can be waived only if the defendant personally does so knowingly, voluntarily, and intelligently; fundamental error is error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial; a defendant's presence is not a right of constitutional magnitude that must be personally waived when the trial judge communicates his answer to a deliberating jury's question concerning a factual issue); *State v. Resendis-Felix*, 209 Ariz. 292, 100 P.3d 457 (Ct. App. Div. 2 2004), review granted, cause remanded, 2005 WL 2414769 (Ariz. 2005) and opinion vacated on reconsideration on other grounds, 2005 WL 2787475 (Ariz. Ct. App. Div. 2 2005) (sentencing a defendant outside constitutional limits creates an illegal sentence, which can constitute fundamental error; relief granted, and resentencing ordered).

**§ 5:13 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(b): Lack of jurisdiction**

Under Rule 32.1(b) relief is available if the convicting court was without jurisdiction to render judgment or to impose sentence. Courts no longer need to characterize errors as "jurisdictional" to afford postconviction relief when a conviction or sentence violates the federal or state constitutions. (See Ariz. R.Crim. P. 32.1 — identifying grounds for relief). *State v. Maldonado*, 223 Ariz. 309, 223 P.3d 653 (2010).

**§ 5:14 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(c): Excessive sentence**

Under Rule 32.1(c) relief is available if the sentence is in excess of the statutory maximum or otherwise unauthorized, even though the conviction may be valid.

**§ 5:15 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(c): Excessive sentence—Case law**

For case law involving Rule 32 relief based on an excessive sentence, see e.g., *State v. Arellano*, 213 Ariz. 474, 143 P.3d 1015 (2006) (death sentence case; the petitioners filed petitions for post-conviction relief claiming that they are mentally retarded and hence ineligible for being put to death; we hold that the state is not precluded from presenting testimony from Department of Corrections personnel regarding the petitioners' current communication, social, and interpersonal skills, as well as testimony relating to their work, leisure, and health habits); *State v. Cazares*, 205 Ariz. 425, 72 P.3d 355 (Ct. App. Div. 2 2003) (Rule 32.1(c) permits post-conviction relief when the sentence imposed is "not in accordance with the sentence authorized by law;" we conclude that this provision of Rule 32 encompasses a claim that a sentence was not imposed in compliance with the relevant sentencing law, at least for a sentence imposed on a guilty-pleading defendant); *State v. Fragozo*, 197 Ariz. 220, 3 P.3d 1140 (Ct. App. Div. 2 2000) (Rule 32 relief granted on claim that defendant was entitled to presentence incarceration credit).

**§ 5:16 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(d): Continued custody after expiration of sentence**

Under Rule 32.1(d) relief is available if the convicted person is being held in custody after expiration of the sentence.

**§ 5:17 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(d): Continued custody after expiration of sentence—Case law**

Under Rule 32.1(d) relief is available if the convicted person is being held in custody after expiration of the sentence. *State v. Davis*, 148 Ariz. 62, 712 P.2d 975 (Ct. App. Div. 1 1985) (mere challenges to the Department of Corrections' computation of good time credit are not cognizable under Rule 32 unless they result in the defendant remaining in custody when he should otherwise be free).

**§ 5:18 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(e): Newly discovered evidence**

Under Rule 32.1(e) newly discovered evidence that probably would have changed the verdict or sentence is grounds for relief.

**§ 5:19 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(e): Newly discovered evidence—Case law**

Under Rule 32.1(e) newly discovered evidence that probably would have changed the verdict or sentence is grounds for relief. *State v. Swoopes*, 216 Ariz. 390, 166 P.3d 945 (Ct. App. Div. 2 2007) (defendant's claim hinged largely on his assertion of newly discovered facts that trial judge had engaged in an *ex parte* communication, a note, with the jury; jury note held not newly discovered evidence); *Williams v. Stewart*, 441 F.3d 1030 (9th Cir. 2006), opinion amended, 2006 WL 997605 (9th Cir. 2006) (death sentence case; under Arizona law, a claim is procedurally defaulted if it is not raised in compliance with Rule 32, Ariz. R. Crim. Proc.; Rule 32.1(e), Ariz. R. Crim. Proc., allows a petitioner to seek post-conviction relief if newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence; such newly discovered material facts exist if: (1) the newly discovered material facts were discovered after the trial; (2) the defendant exercised due diligence in securing the newly discovered material facts; and (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).

**§ 5:20 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(f): Defendant's failure to file notice of postconviction relief not fault of defendant**

Under Rule 32.1(f), as amended in 2000, relief is available if "the defendant's failure to file a notice of postconviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part. Relief pursuant to Rule 32.1(f) will continue to be unavailable to all postconviction relief proceedings not 'of-right. Az Rule Crim Pro Rule 32.1 Comment.

**§ 5:21 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(f): Defendant’s failure to file
notice of postconviction relief not fault of
defendant—Case law**

For case law on Rule 32.1(f) relief based on defendant’s failure to file notice of postconviction relief as not the fault of defendant, see e.g., *State v. Tapp*, 133 Ariz. 549, 653 P.2d 6 (1982) (Rule 32.1(f) specifically refers to the “failure to appeal” and does not, on its face, extend postconviction relief to an appellant who has filed an appeal but failed to prosecute it; Rule 32.1(f) includes the situation in which the defendant fails to appeal because the trial court did not advise him of his appeal rights, and the situation in which the defendant intended to appeal and thought timely appeal had been filed by his attorney when in reality it had not; no case extends Rule 32 relief to a defendant whose appeal was dismissed for want of prosecution).

**§ 5:22 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(g): Significant change in the
law—Case law**

Under Rule 32.1(g) relief is available if there has been a significant change in law that if determined to apply to the defendant’s case would probably overturn the conviction or sentence. For case law, see e.g., *State v. Stemmer*, 170 Ariz. 174, 823 P.2d 41 (1991) (generally, Rule 32 precludes relief on grounds that were or could have been raised and adjudicated on appeal; however, under Rule 32.1(g) there is no preclusion when there has been a significant change in the law applied in the process which led to the petitioner’s conviction or sentence, and there are sufficient reasons to allow retroactive application of the changed legal standard).

**§ 5:23 Arizona Rule of Criminal Procedure 32—Rule 32.1:
Grounds for relief—32.1(h): Clear and convincing
evidence that facts underlying claim would be
sufficient to establish that no reasonable fact-finder
would find defendant guilty**

Under Rule 32.1(h) postconviction relief is available where “[t]he defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.” Rule 32.1(h) “is warranted by the U.S. Supreme Court’s pronouncement that claims of actual innocence are not cognizable under the federal habeas corp[us]

remedy . . . [A Rule 32.1(h)] claim is independent of a claim under [Rule 32.1(e)]. A defendant who establishes a claim of newly discovered evidence does not need to comply with the requirements of [Rule 32.1(h)].” Ariz Rule Crim Pro Rule 32.1 Comment.

**§ 5:24 Arizona Rule of Criminal Procedure 32—Text of Rule
32.2: Preclusion of Remedy**

Rule 32.2. Preclusion of remedy

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

- (1) Raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
- (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
- (3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under Rules 32.1(d), (e), (f), (g) and (h) is to be raised in a successive or untimely postconviction relief proceeding, the notice of postconviction 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.

**§ 5:25 Arizona Rule of Criminal Procedure 32—Text of Rule
32.2: Preclusion of Remedy—Case law**

For case law on the issue of preclusion, see e.g., *State v. Swoopes*, 216 Ariz. 390, 166 P.3d 945 (Ct. App. Div. 2 2007) (mere assertion by defendant that his or her right to fair trial has been violated is not a claim of sufficient constitutional magnitude for purposes of postconviction relief statute relating to preclusion of remedy under Rule 32.2; to avoid preclusion, a defendant must show a constitutional right is implicated, one that can only be waived by a defen-

dant personally; however, not all error that is fundamental involves the violation of a constitutional right that can be waived only if the defendant personally does so knowingly, voluntarily, and intelligently; fundamental error is error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial; a defendant's presence is not a right of constitutional magnitude that must be personally waived when the trial judge communicates his answer to a deliberating jury's question concerning a factual issue); *State v. Bennett*, 213 Ariz. 562, 146 P.3d 63 (2006) (with assistance of new counsel, defendant filed second petition for postconviction relief, alleging that state failed to present sufficient evidence on causation element of felony murder conviction, and that her appellate counsel was ineffective for failing to raise this challenge on direct appeal; we granted review to consider whether Rule 32.2.(a)(3) precludes defendant Donna Jean Bennett's claim of ineffective assistance of appellate counsel and, if it does not, whether Bennett has stated a colorable claim; Bennett bases her ineffective assistance of counsel claim on appellate counsel's failure to challenge the sufficiency of the evidence on the causation element of her felony murder conviction; we hold that Bennett's claim is not precluded and that she has stated a colorable claim of ineffective assistance of appellate counsel; as a general rule, when ineffective assistance of counsel claims are raised, or could have been raised, in a Rule 32 postconviction relief proceeding, subsequent claims of ineffective assistance will be deemed waived and precluded; we have previously noted, however, that it is improper for appellate counsel to argue his own ineffectiveness at trial because the standard for determining whether counsel was reasonably effective is an objective standard which we feel can best be developed by someone other than the person responsible for the conduct; the same principles apply when postconviction relief counsel might argue his own ineffectiveness on direct appeal; it is as difficult for postconviction relief counsel to objectively review his own performance on direct appeal and to argue any inadequacies in that performance on behalf of his client as it is for appellate counsel to argue his own ineffectiveness at trial; here, Bennett's first postconviction relief petition did not raise the issue of ineffective assistance of appellate counsel; normally, such a claim would now be precluded; in this case, however, postconviction relief counsel could have raised the claim only by asserting his own ineffectiveness in failing to challenge the sufficiency of the evidence on the causation issue; as our case law makes clear, such an argument is improper; we note that as long as the courts appoint the same attorney to represent a defendant in both his

her direct appeal and postconviction relief petition and suspend the appeal to permit the court to consider it with the petition, the defendant will never be able to raise ineffective assistance of appellate counsel claims in the original postconviction relief petition; for the foregoing reasons, we conclude that the second postconviction relief petition, in which Bennett was represented by different counsel, was the first proceeding in which she could raise the ineffective assistance of appellate counsel argument; therefore, Rule 32.2.(a)(3) does not preclude Bennett's ineffective assistance of counsel claim).

§ 5:26 Arizona Rule of Criminal Procedure 32—Rule 32.3: Transfer under Arizona Rule of Criminal Procedure

"If a defendant applies for a writ of habeas corpus in a trial court having jurisdiction of his or her person raising any claim attacking the validity of his or her conviction or sentence, that court shall under this rule transfer the cause to the court where the defendant was convicted or sentenced and the latter court shall treat it as a petition for relief under this rule and the procedures of this rule shall govern." Rule 32.3, Ariz. R. Crim. Proc.

§ 5:27 Arizona Rule of Criminal Procedure 32—Rule 32.3: Transfer under Arizona Rule of Criminal Procedure—Text of Rule 32.3

Rule 32.3. Nature of Proceeding and Relation to Other Remedies

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

§ 5:28 Arizona Rule of Criminal Procedure 32—Rule 32.4— Filing

A Rule 32 proceeding is commenced by the timely filing of a notice of postconviction relief with the convicting court. Ariz. Rev. Stat. Ann. § 13-4234(A); Rule 32.4, Ariz. R. Crim. Proc. A model

form of notice of postconviction relief is contained in Form 24(c), Ariz. R. Crim. Proc.

**§ 5:29 Arizona Rule of Criminal Procedure 32—Rule 32.4—
Text of Rule 32.4**

Rule 32.4 Commencement of Proceedings

a. Form, Filing and Service of Petition. A proceeding is commenced by timely filing a notice of postconviction relief with the court in which the conviction occurred. The court shall provide notice forms for commencement of all postconviction 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 postconviction relief proceeding. In all other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later. In a capital case, the clerk of the Supreme Court shall expeditiously file a notice for postconviction 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 postconviction 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 postconviction 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 postconviction counsel of the capital defendant unless counsel is waived or good cause is shown to appoint another qualified attorney from the list described in A.R.S. § 13-4041.

On the first notice in capital cases, appointed counsel for the defendant shall have 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 postconviction 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 status reports in the Supreme Court every sixty days until the petition for postconviction relief is filed.

(2) Rule 32 of-right and non-capital cases. Upon the filing of a timely or first notice in a Rule 32 proceeding, the presiding judge, or his or her designee, shall appoint counsel for the defendant within 15 days if requested and the defendant is determined to be indigent. Upon the filing of all other notices in non-capital cases, the appointment of counsel is within the discretion of the presiding judge. In 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