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

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

Rule 32.1. Scope of Remedy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 33.1. Scope of Remedy

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

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

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

Grounds for relief:

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

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

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

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

(h) Proposed Rule 33.1(h), like its Rule 32.1(h) counterpart, would afford relief if "the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would find the defendant guilty of the offense beyond a reasonable doubt." However, this may misconstrue the application of Rule 33.1(h) in cases involving pleading defendants. The Task Force might modify this provision to require clear and convincing evidence that the defendant is actually innocent.

Rule 32.2. Preclusion of Remedy

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

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

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

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

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

Rule 33.2. Preclusion of Remedy

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 32.4. Filing a Notice Requesting Post-Conviction Relief

Two general changes are noteworthy.

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

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

Rule 32.4 – Filing a Notice Requesting Post-Conviction Relief

Rule 32.5 – Appointment of Counsel

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

Rule 32.7 – Petition for Post-Conviction Relief

Rule 32.8 – Transcript Preparation

Rule 32.10 – Assignment of a Judge

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

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

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

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

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

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

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

Rule 33.4. Filing a Notice Requesting Post-Conviction Relief

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

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

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

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

Rule 32.5. Appointment of Counsel

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

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

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

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

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

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

Rule 33.5. Appointment of Counsel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 32.7. Petition for Post-Conviction Relief

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

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

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

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

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

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

Rule 33.7. Petition for Post-Conviction Relief

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

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

Rule 32.8. Transcript Preparation

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

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

Rule 33.8. Transcript Preparation

Proposed Rule 33.8 is substantively similar to proposed Rule 32.8.

Rule 32.9. Response and Reply; Amendments

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

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

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

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

Rule 33.9. Response and Reply; Amendments

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

Rule 32.10. Assignment of a Judge

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

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

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

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

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

Rule 33.10. Assignment of a Judge

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

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

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

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

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

Proposed Rule 33.11 is identical to proposed Rule 32.11.

Rule 32.12. Informal Conference

This proposed rule is identical to current Rule 32.7.

Rule 33.12. Informal Conference

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

Rule 32.13. Evidentiary Hearing

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

Rule 33.13. Evidentiary Hearing

Proposed Rule 33.13 is identical to proposed Rule 32.13.

Rule 32.14. Motion for Rehearing

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

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

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

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

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

Rule 33.14. Motion for Rehearing

Proposed Rule 33.14 is identical to proposed Rule 32.14.

Rule 32.15. Notification to the Appellate Court

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

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

Rule 33.15. Notification to the Appellate Court

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

Rule 32.16. Petition and Cross-Petition for Review

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

There also are notable substantive changes.

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

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

Rule 33.16. Petition and Cross-Petition for Review

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

Rule 32.17. Post-Conviction Deoxyribonucleic Acid Testing

Proposed Rule 32.17 is based on current Rule 32.12.

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

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

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

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

Rule 33.17. Post-Conviction Deoxyribonucleic Acid Testing

Proposed Rule 33.17 is substantively similar to proposed Rule 32.17.

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

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

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

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

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

Rule 32.20. Extensions of Time; Victim Notice and Service

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