

**ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE**

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**IN THE SUPREME COURT  
IN AND FOR THE STATE OF ARIZONA**

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|---------------------------------------------|---|-----------------------------------------------|
| In the Matter of:                           | ) | No. R-26-0007                                 |
|                                             | ) |                                               |
| Petition to Amend Ariz. R. Crim. P. 6.3     | ) | <b>Comment of Arizona Attorneys for</b>       |
| to Protect a Defendant's Post-              | ) | <b>Criminal Justice regarding Petition to</b> |
| Conviction Rights and Comply with           | ) | <b>Amend Ariz. R. Crim. P. 6.3.</b>           |
| <i>Garza v. Idaho</i> , 586 U.S. 232 (2019) | ) |                                               |
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Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submits the following comment on the Petition to Amend Ariz. R. Crim. P. 6.3 to Protect a Defendant's Post-Conviction Rights and Comply with *Garza v. Idaho*, 586 U.S. 232 (2019).

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the

courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Petitioner raises valid concerns respecting the failures of defense attorneys to file notices of post-conviction relief and the resulting unknowing, unintelligent, and involuntary waiver by defendants of appeal and post-conviction rights. Because the Petition explains in considerable detail the legal issues involved and AACJ agrees with that analysis, there is no need to restate those issues here – instead, AACJ incorporates those legal explanations by reference. However, it is useful to examine the real-world impact of the gap described in the Petition and how it results in the loss of critical appeal and post-conviction relief rights to defendants.

In the past few years, AACJ has encountered several cases and situations in which attorneys failed to file notices of appeal and/or notices of post-conviction relief, and such failures to perform minimal, ministerial tasks had grave impact on the substantial rights of defendants. Below are just two examples in which undersigned counsel became involved when family members reached out to private counsel.

In one case, the defendant was convicted of First-Degree Murder, and the attorney failed to file a notice of appeal. The defendant was not aware of this and did not understand why the notice of appeal was not filed, believing his trial counsel had

initiated the appeal. After his sentencing, nearly nine months passed. Concerned he had not heard from anyone about the status of his appeal and getting no response from attempts to contact his trial counsel, he asked his family to reach out to private attorneys to see what they could find out. Unfortunately, his trial counsel never filed a notice of appeal. The defendant filed a late notice, but the Court of Appeals dismissed the appeal as untimely. Based on guidance from undersigned counsel during consultation, the defendant filed a notice of post-conviction relief that is presently pending with appointed counsel.

In another case, the defendant went to trial and was convicted of sex-related charges and was sentenced to life in prison. Trial counsel failed to timely file a notice of appeal, filing it several days late and causing the appeal to be dismissed (and failing to ask to file a delayed appeal). Following the dismissal, trial counsel failed to notify the defendant regarding what happened with the appeal and did not file any notice of post-conviction relief such that Rule 32 proceedings became untimely as well. The issue was only discovered because the defendant sought information on the status of his appeal and consulted with undersigned counsel, who was able to coordinate with the Office of Public Defense Services to get new counsel appointed

for the defendant in order to file an untimely notice of post-conviction relief and seek to explain the failure to timely file.<sup>1</sup>

These issues are, unfortunately, common. When it comes to pleading defendants and the failure to file notices of post-conviction relief, it is even more common. While defendants are advised by the trial judge at sentencing of their rights to review and the temporal deadlines for filing notices of appeal and/or post-conviction relief, these advisements are being given in the aftermath of imposition of sentence – a time when most defendants are emotionally overwhelmed.

Many trial defense attorneys incorrectly believe that even the filing of a notice of post-conviction relief presents a conflict of interest, and/or they do not fully understand the appeal or post-conviction relief processes sufficiently to provide explanations to defendants so that they may file the requisite notices. Undersigned counsel speaks to at least one or two inmates (often more) every week who ask questions about post-conviction relief and who do not understand the issues respecting timeliness. Sadly, many of these defendants lost the opportunity to timely file petitions, even initial, of-right petitions.

Adopting the Petition would create almost no burden on the courts or on defense attorneys. As for the courts, the proposed rule change would likely reduce

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<sup>1</sup> A bar complaint was filed against the trial attorney.

burdens by reducing the frequency with which timeliness needs to be litigated. Regarding burden on counsel, undersigned counsel routinely files notices of appeal and notices of post-conviction relief as part of his general practice to ensure preservation of defendant rights in the precise manner contemplated by the petition discussed herein. Defense experts in appellate and post-conviction procedure teach in continuing education classes that best practice is not only to advise clients respecting such procedures, but also to offer to file the notice on the client's behalf unless directed otherwise. This applies to trial counsel filing a notice of appeal as well as plea counsel and/or appellate counsel filing a notice of post-conviction relief. These notices are extremely simple to prepare and are ministerial in nature, but they are critical to preserve the rights of defendants. Compliance with the proposed rule would thus require very little of defense attorneys. The cost-benefit analysis is overwhelmingly in favor of the Petitioner's proposal.

The Petition, while imposing little to no burden, appears to resolve the issues undersigned counsel has repeatedly encountered involving defendants who unwittingly waive appellate and post-conviction relief rights. By requiring that prior to the granting of a motion to withdraw, the attorney must either file a notice of appeal or notice of post-conviction relief (whichever applies) or must specify that the defendant has been advised of his/her rights and has opted not to pursue appellate or PCR remedies, the attorney remains responsible for such filings as a matter of

law. This clarity and ongoing duty will simplify future litigation respecting timeliness – or hopefully will eliminate the need for such litigation because attorneys will comply and file the necessary notices.

With respect to the comment by Michelle Villanueva Skura, her comment opposing the Petition contradicts itself. She raises concerns that the petition “creates a practical dilemma in cases involving a breakdown of the attorney-client relationship, where communication has become impossible or where the client is unresponsive.” [Villanueva Skura comment at 4]. Her concern is that in such situations, the attorney would be unable to withdraw. But later in her comment, she suggests an alternative in which the attorney would be required to certify “that the defendant has been advised of the Rule 33 filing deadline and the consequences of failing to meet it.” It is unclear why a breakdown in communications would enable this advisement, but would prevent the limited communication needed to adhere to the proposed rule.

More importantly, the dilemma suggested by Ms. Villanueva Skura is not realistic. The attorney withdrawing, if advisement and/or filing of a notice of appeal or notice of post-conviction relief is an issue, would have had to have represented the defendant through sentencing. It would take mere minutes following a sentencing hearing to have the required conversation with the defendant – in fact, it could (and

often should) even be held before the sentencing hearing.<sup>2</sup> It is not clear why counsel, who could not have a breakdown in communication with the client before the sentencing hearing while continuing representation for the hearing, would suddenly have such a breakdown immediately thereafter that is so serious as to prevent discussion as to the filing of the requisite notice. Moreover, if there was such a breakdown, there is no harm in counsel erring on the side of caution by filing the notice, which could always be withdrawn thereafter when communication is established by a successor attorney. In any case, Ms. Villanueva Skura's hypothesized problem does not seem to be one raising any serious concern, particularly compared to the importance of assuring preservation of the rights of defendants to post-conviction remedies. It is simply not a problem that will arise.

When a client's dissatisfaction with counsel's performance leads to a total breakdown in communication, that requires the attorney to seek withdrawal prior to sentencing. If the court grants withdrawal, a new attorney will proceed with sentencing and can then advise the client about seeking post-conviction relief and filing the notice. If the court denies withdrawal, the attorney retains the duty to give

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<sup>2</sup> It should also be noted that in the event a defendant was upset or angry with defense counsel respecting the result of a sentencing hearing, that is all the more reason why the defendant would engage in discussion respecting post-conviction remedies, such that breakdown in communication would not impede compliance with the proposed rule.

such advice and perform such duties, even if the attorney knows a claim for ineffective assistance of counsel will likely be filed. Criminal defense attorneys are obligated to protect the rights to further review of their clients, not only those who congratulated their performance in the case but also those who criticized their performance.

Because the burden of implementation of the proposed rule is *de minimis* on the courts and attorneys, and further, given the extremely critical and fundamental nature of the rights of defendants involved and the manner in which the proposed rule protects those rights, AACJ strongly supports the proposed rule change.

DATED (electronically filed): April 23, 2026.

By: /s/ Seth Apfel  
Seth M. Apfel

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