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8 IN THE SUPREME COURT
9 STATE OF ARIZONA

10 PETITION TO ADOPT RULE 32.12,
11 ARIZONA RULES OF CRIMINAL
12 PROCEDURE

SUPREME COURT NO. R-14-_____

Petition to Adopt Rule 32.12, Ariz. R. Crim. P.

13 The Maricopa County Attorney, pursuant to Arizona Supreme Court Rule 28, hereby
14 petitions this Court to adopt a new rule of criminal procedure to provide a process for complying
15 with A.R.S. § 13-4240.

16 Respectfully submitted this 10th day of January, 2014.

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20 By 
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1 **INTRODUCTION**

2 Over a decade ago the Arizona Legislature added A.R.S. § 13-4240 which gives convicted
3 felons a mechanism to petition the court for deoxyribonucleic acid (DNA) testing of evidence. As
4 knowledge about DNA testing has grown and various nationwide organizations have educated
5 prisoners about the ability to have evidence tested or re-tested, requests for DNA testing under this
6 statute have increased significantly. This Court has noted that although the statute provides a means
7 for obtaining evidence that might be used in a postconviction relief proceeding not a postconviction
8 remedy, there is some interplay between the statute and postconviction relief proceedings under
9 Rule 32. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶20, 21, 278 P.3d 1276, 1280 (2012). In *Gutierrez*
10 this Court attempted to clarify the interplay between these two separate procedures. The proposed
11 new rule attempts to establish a clear procedure for the court and parties to follow while
12 incorporating the holding of *Gutierrez*.
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15 **DISCUSSION**

16 Proposed Rule 32.12 seeks to establish clear procedures for the implementation of A.R.S. §
17 13-4240 much like the current Rule 32 creates procedures for the implementation of §§ 13-4231 to -
18 4239. First, the new rule clarifies that a convicted person must petition the court to order DNA
19 testing. Establishing this procedure will clarify some of the potential confusion this Court discussed
20 in *Gutierrez* regarding how the convicted felon should make a request under the statute. *See*
21 *Gutierrez*, 229 Ariz. at 577, ¶ 21.
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23 Second, the proposed rule provides specific procedures regarding the filing of petitions and
24 the time to file a response. The statute only provides that the prosecutor must get notice and an
25 opportunity to respond. The statute does not create a procedure to implement that provision. The
26 result is that courts have no guidance concerning whether proceedings under this statute are a
27 separate action or part of the original criminal action. Additionally, the statute is silent regarding
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1 the State's response time which leads to inconsistent results among various judges. The proposed
2 rule clarifies that petitions filed under the statute are part of the same criminal case that resulted in
3 the felony conviction and it is not a separate action. This clarification will make it easier for the
4 courts and prosecutors to easily identify the underlying case which is critical for the application of
5 the statute. Requiring that the petition be filed under the original criminal cause number will also
6 help petitioners provide notification to the proper prosecuting authority. Additionally, the proposed
7 rule adopts the forty-five (45) day response time that is provided in Rule 32.6 and § 13-4236
8 because the amount of time it takes to secure and review cases that may be many years old is
9 essentially the same whether a person has instituted a proceeding under Rule 32.1 or § 13-4240.
10 The State needs sufficient time to thoroughly review the facts of the case to properly respond and
11 advise the court regarding the application of § 13-4240(B) and (C) which are fact intensive matters.
12 A 45 day response time will allow the State sufficient time to provide the court with all the
13 necessary information.
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16 Third, the proposed rule attempts to harmonize § 13-4240 with current Rule 32 proceedings
17 as directed in *Gutierrez*. Although § 13-4240 is separate from Rule 32 postconviction relief and its
18 main objective is to provide a mechanism for a convicted felon to obtain evidence that might be
19 used in a postconviction relief proceeding, § 13-4240(J) and (K) mandate specific actions that must
20 be read in conjunction with Rule 32 procedures and remedies. Proposed rule 32.12(h) clarifies §
21 13-4240(J) consistent with the holding in *Gutierrez* by providing that if the DNA results are not
22 favorable to the petitioner the court must dismiss all DNA-related claims for postconviction relief.
23 *See Gutierrez*, 229 Ariz. at 577, ¶ 23 (“Thus, subsection (J) requires dismissal of DNA-related
24 claims, without the need for any hearing, when the test results are unfavorable. . .”) Likewise,
25 proposed Rule 32.12(i) clarifies § 13-4240(K) by requiring a hearing if the DNA results are
26 favorable to the petitioner and explaining the nature of that hearing consistent with *Gutierrez*. *See*
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1 *Gutierrez*, 299 Ariz. at 578-79, ¶¶ 27, 32 (“We thus conclude that when DNA test results ordered
2 under § 13-4240 are favorable to the petitioner, those results alone entitle the petitioner to some
3 type of Rule 32 hearing. . . . But, under §13-4042(K), a court faced with favorable DNA test results,
4 but no material issues of fact, must nonetheless hold a non-evidentiary hearing to permit the parties
5 to argue why the petitioner should or should not be entitled to relief as a matter of law.”)
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7 Finally, as drafted, the proposed new rule makes some technical, non-substantive changes
8 from the language of the statute. For example § 13-4240(D), (E) and (F) were not repeated as
9 individual subsections in the proposed rule. Instead, the provisions of § 13-4240(D) are
10 incorporated into subsections (c) and (d) of the proposed rule. Section 13-4240(E) is included
11 under subsection (b) in the rule. Section 13-4240(F) is combined with the language from § 13-
12 4240(D) and included in subsections (c) and (d) in the new rule. The intent of these modifications
13 from the statute is merely stylistic and an attempt to simplify and streamline the proposed rule.
14

15 **CONCLUSION**

16 Proposed Rule 32.12 will simplify the administration of § 13-4240 by providing specific
17 procedures to be followed when filing and responding to requests for DNA testing. Additionally,
18 the rule helps explain the court’s obligations when DNA results are favorable and unfavorable to the
19 petitioner. Adopting this new rule will help promote efficiency and reduce confusion for
20 petitioners, prosecutors, and the courts in this important and expanding area of postconviction law.
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22 Respectfully submitted this 10th of January, 2014.

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1 **DRAFT OF PROPOSED NEW ARIZONA RULE OF CRIMINAL PROCEDURE**

2
3 Rule 32.12 Postconviction deoxyribonucleic acid testing

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5 a. Any person who has been convicted and sentenced for a felony offense, may petition the court for
6 the forensic deoxyribonucleic acid (DNA) testing of any evidence that is in the possession or
7 control of the court or the state, that is related to the investigation or prosecution that resulted in the
8 judgment of conviction, and that may contain biological evidence.

9 b. The petition will be filed in the same criminal cause number as the felony conviction. The
10 convicted person shall serve the prosecuting agency that was responsible for the case at the time of
11 conviction with a copy of the petition filed under this rule. The state shall have 45 days from date
12 of service to respond to any petition. The court may appoint counsel for an indigent petitioner at
13 any time during any proceedings under this rule.

14 c. Upon consideration of the petition and the state's response, the court shall order DNA testing if
15 the court finds that all of the following apply:

- 16 1. A reasonable probability exists that the petitioner would not have been prosecuted or
17 convicted if exculpatory results had been obtained through DNA testing.
- 18 2. The evidence is still in existence and is in a condition that allows DNA testing to be
19 conducted.
- 20 3. The evidence was not previously subjected to DNA testing or was not subjected to the
21 testing that is now requested and that may resolve an issue not previously resolved by the
22 previous testing.

23 If the court orders testing pursuant to this section, the court shall select a laboratory that meets the
24 standards of the DNA advisory board to conduct the testing and shall order the method and
25 responsibility for payment as necessary.

26 d. Upon consideration of the petition and the state's response, the court may order DNA testing if
27 the court finds that all of the following apply:

- 28 1. A reasonable probability exists that either:
 - 29 i. The petitioner's verdict or sentence would have been more favorable if the results
30 of DNA testing had been available at the trial leading to the judgment of conviction,
31 or
 - 32 ii. DNA testing will produce exculpatory evidence.

1 2. The evidence is still in existence and is in a condition that allows DNA testing to be
2 conducted.

3 3. The evidence was not previously subjected to DNA testing or was not subjected to the
4 testing that is now requested and that may resolve an issue not previously resolved by the
5 previous testing.

6 If the court orders testing pursuant to this section, the court shall select a laboratory that meets the
7 standards of the DNA advisory board to conduct the testing and the court may require the petitioner
8 to pay the costs of testing.

9 e. If the prosecutor or defense counsel has previously subjected evidence to DNA testing, the court
10 may order the prosecutor or defense counsel to provide all the parties and the court with access to
11 the laboratory reports that were prepared in connection with the testing, including underlying data
12 and laboratory notes. If the court orders DNA testing pursuant to this rule, the court shall order the
13 production of any laboratory reports that are prepared in connection with the testing and may order
14 the production of any underlying data and laboratory notes.

15 f. If a petition is filed pursuant to this rule, the court shall order the state to preserve during the
16 pendency of the proceeding all evidence in the state's possession or control that could be subjected
17 to DNA testing. The state shall prepare an inventory of the evidence and shall submit a copy of the
18 inventory to the defense and the court. If evidence is intentionally destroyed after the court orders
19 its preservation, the court may impose appropriate sanctions, including criminal contempt, for a
20 knowing violation.

21 g. The court may make any other orders that the court deems appropriate, including designating any
22 of the following:

- 23 1. The type of DNA analysis to be used.
- 24 2. The procedures to be followed during the testing.
- 25 3. The preservation of some of the sample for replicating the testing.
- 26 4. Elimination samples from third parties.

27 h. If the results of the postconviction DNA testing are not favorable to the petitioner, the court shall
28 dismiss any DNA-related claims under Rule 32.1 without any hearing. The court may make further
orders as it deems appropriate, including any of the following:

1. Notifying the board of executive clemency or a probation department.
2. Requesting that the petitioner's sample be added to the federal combined DNA index system offender database.
3. Providing notification to the victim or family of the victim.

1 i. Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of
2 the postconviction DNA testing are favorable to the petitioner, the court shall order a hearing and
3 make any further orders that are required pursuant to statute or the Arizona rules of criminal
4 procedure. If there are no material issues of fact, the hearing required under this subsection need
5 not be an evidentiary hearing, but it must give the parties the opportunity to argue why the
6 petitioner should or should not be entitled to relief under Rule 32.1 as a matter of law.
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