

1 **WILLIAM G. MONTGOMERY**
2 **MARICOPA COUNTY ATTORNEY**
3 **(FIRM STATE BAR NO. 00032000)**

4 **MARK FAULL**
5 **CHIEF DEPUTY**
6 **301 WEST JEFFERSON STREET, SUITE 800**
7 **PHOENIX, ARIZONA 85003**
8 **TELEPHONE: (602) 506-3800**
9 **(STATE BAR NUMBER 011474)**

10 **IN THE SUPREME COURT**
11 **STATE OF ARIZONA**

12 **PETITION TO MODIFY RULE 24.2,**
13 **ARIZONA RULES OF CRIMINAL**
14 **PROCEDURE**

SUPREME COURT NO. R-14-_____

Petition to Modify Rule 24.2, Ariz. R. Crim. P.

15 The Maricopa County Attorney, pursuant to Arizona Supreme Court Rule 28, hereby petitions
16 this Court to modify Rule 24.2 of the Arizona Rules of Criminal Procedure to provide a procedural
17 mechanism for prosecutors to comply with ER 3.8(h) and to give prosecutors a way to address other
18 types of erroneous convictions.

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

20 WILLIAM G. MONTGOMERY
21 MARICOPA COUNTY ATTORNEY

22 By 
23 MARK FAULL
24 CHIEF DEPUTY
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1 **INTRODUCTION**

2 On November 14, 2013, this Court issued an order which added ER 3.8(g) – (i) and ER 3.10.
3 In a comment to this proposed rule, the Maricopa County Attorney’s Office (MCAO) noted that
4 while ER 3.8(h) requires a prosecutor to take appropriate steps to set aside a conviction under some
5 circumstances, the Arizona Rules of Criminal Procedure do not provide any specific mechanism for
6 a prosecutor to comply with this mandate. Post-conviction remedies under Rule 32 provide a
7 mechanism only for convicted persons to seek a modification of a conviction or a sentence. Rule
8 24.2 provides a mechanism for vacating a judgment of conviction but that action must be taken
9 within 60 days after the entry of judgment and before a defendant’s appeal is perfected. The
10 supporters of the changes to ER 3.8 relied on convictions that had been vacated many years after the
11 defendant had exhausted all appeals and post-conviction remedies. To the extent that the new ER
12 3.8(h) anticipates that prosecutors will discover clear and convincing evidence that a convicted
13 person did not commit the crime years after the conviction, the current rules do not provide a
14 procedural mechanism for a prosecutor to seek to have the conviction set aside. Although the new
15 ER 3.8(h) only ambiguously requires a prosecutor to “take appropriate steps” to set aside the
16 conviction, a rule change that creates a specific procedural mechanism to comply with this mandate
17 would be helpful to prosecutors and the courts.
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22 **DISCUSSION**

23 As noted above, Rule 24.2 provides a mechanism to vacate a judgment, but it contains time
24 limitations that are too limited for the current rule to apply in the types of cases the supporters of ER
25 3.8(h) described. The proposed change would add a specific section of the rule that would permit
26 the State to request that a conviction be vacated at any time after the entry of judgment and
27 sentence.
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1 The new subsection of Rule 24.2 would only apply to a motion by the State to vacate a
2 conviction; a defendant would still be limited by the time limitations of Rule 24.2 and could still
3 pursue the appellate and Rule 32 post-conviction remedies that are currently available. There are
4 two grounds for vacating a conviction under the proposed new subsection. The first basis tracks the
5 specific language of ER 3.8(h) – that prosecutor believes, and the court finds, that there is clear and
6 convincing evidence that shows a convicted defendant did not commit the offense for which he or
7 she was convicted.
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9 The second ground is more general and would encompass a larger number of possible
10 situations where erroneous convictions should be vacated. One example would be the situation
11 described in the MCAO's last comment to proposed ER 3.8 where prosecutors discovered that
12 several defendants were convicted of crimes based on conduct that was not actually criminalized by
13 the statute. In that situation, motions to vacate were filed and granted, but there was no clear
14 procedural mechanism for this process. Situations of this nature are so rare that it is easy to
15 understand why there is no specific rule addressing it, and, in this instance, the prosecutors were
16 able to work with the courts to make sure justice was done, but having a formal procedure in the
17 rule would certainly simplify the process.
18

19 **CONCLUSION**

20 The proposed modifications to Rule 24.2 will provide a clear procedural mechanism for a
21 prosecutor to comply with the new obligations imposed under ER 3.8(h) while also giving the State
22 the ability to correct other types of erroneous convictions.
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24 Respectfully submitted this 10th of January, 2014.

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26 WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY

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28 MARK FAULL
CHIEF DEPUTY

1 **DRAFT OF MODIFIED RULE 24.2, ARIZONA RULES OF CRIMINAL PROCEDURE**

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3 Rule 24.2. Motion to vacate judgment

4 **a. Grounds for Motion.** Upon motion made no later than 60 days after the entry of judgment and
5 sentence but before the defendant's appeal, if any, is perfected, the court may vacate the judgment
6 on any of the following grounds:

- 7 (1) That it was without jurisdiction of the action;
8 (2) That newly discovered material facts exist, under the standards of Rule 32.1; or
9 (3) That the conviction was obtained in violation of the United States or Arizona
 Constitutions.

10 **b. Previous Rulings.** The court may deny any such motion on the grounds that the matter has
11 already been decided.

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13 **c. Motion Filed After Notice of Appeal.** When a motion is made under this section after a notice
14 of appeal has been filed, the clerk of the Superior Court shall immediately send a copy to the
15 attorney general and to the clerk of the Appellate Court in which the appeal has been filed.

16 **d. Appeal From Decision on Motion.** In noncapital cases, the party appealing a final decision on
17 the motion shall file the notice of appeal with the clerk of the trial court within 20 days after entry
18 of the decision in superior court, or within 14 calendar days after entry of the decision in a court of
19 limited jurisdiction. In capital cases, the court, after denying a motion to vacate judgment, shall
 order the clerk to file a notice of appeal from the denial.

20 **E. STATE'S MOTION TO VACATE JUDGMENT. AT ANY TIME AFTER THE ENTRY OF**
21 **JUDGMENT AND SENTENCE, UPON REQUEST OF THE STATE, THE COURT MAY**
22 **VACATE THE JUDGMENT ON ANY OF THE FOLLOWING GROUNDS:**

- 23 (1) THERE IS CLEAR AND CONVINCING EVIDENCE ESTABLISHING THAT A
24 DEFENDANT WAS CONVICTED OF AN OFFENSE THAT THE DEFENDANT DID
25 NOT COMMIT; OR
26 (2) THAT THE CONVICTION WAS BASED ON AN ERRONEOUS APPLICATION OF
27 THE LAW.