

APPENDIX 3

R-92-002
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NOEL K. DESSAINT
CLERK SUPREME COURT
BY

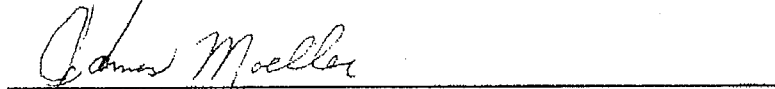
THE SUPREME COURT OF THE STATE OF ARIZONA

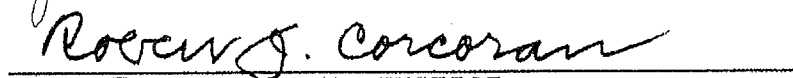
ORDER AMENDING RULE 32,
ARIZONA RULES OF CRIMINAL PROCEDURE

IT IS ORDERED amending Rule 32, Arizona Rules of Criminal Procedure, as set forth in the attachment hereto,* effective December 1, 1992. The attached amendments shall be applicable to defendants sentenced after December 1, 1992.


Dated in the City of Phoenix, Arizona
at the Arizona Courts Building, this
2nd day of June 1992.


STANLEY G. FELDMAN, CHIEF JUSTICE


JAMES MOELLER, VICE CHIEF JUSTICE


ROBERT J. CORCORAN, JUSTICE


THOMAS A. ZLAKET, JUSTICE


FREDERICK J. MARTONE, JUSTICE

* Changes or additions in text are indicated by underscoring; deletions from text are indicated by ~~strikeouts~~.

Rev. May 26, 1992 4:25 P.M

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 ~~on the ground or grounds that:~~ on any of the following grounds:

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. ~~He~~ The person is being held in custody after ~~his~~ the sentence imposed has expired;

e. ~~Newly discovered material facts exist, which the court, after considering~~

~~(1) The probability that such facts, if introduced would have changed the verdict, finding or sentence;~~

~~(2) The diligence which would have been required to discover and produce the evidence at trial;~~

~~(3) The promptness with which the petitioner has commenced a proceeding after discovery of such facts; may require that the conviction or sentence be vacated;~~

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 petitioner's~~ defendant's failure to appeal from the judgment, sentence, or both within the prescribed time was without fault on ~~his~~ the defendant's part; or

g. ~~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.~~ 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.

Comment to Rule 32.1(e)

Impeachment evidence will rarely be of a type which would probably have changed the verdict at trial. However, where newly-discovered impeachment evidence substantially undermines testimony which was of critical significance at trial, the court should evaluate whether relief should be granted on the grounds that the

evidence probably would have changed the result. Dicta in cases such as State v. Fisher, 141 Ariz. 227, 250-51, Cert. Denied, 469 U.S. 1066, 105 S.Ct. 548 (1984), suggesting that a defendant will always be barred from relief if newly-discovered evidence is solely for impeachment, have never been incorporated into the Arizona Rules of Criminal Procedure and should not preclude relief deemed necessary in the court's discretion to avoid a miscarriage of justice.

RULE 32.2 PRECLUSION OF REMEDY

a. ~~Preclusion. A petitioner will not be given defendant shall be precluded from relief under this rule based upon any ground:~~

(1) Still 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) ~~Knowingly, voluntarily and intelligently not raised 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) and (g). When a claim under Rules 32.1(d), (e), (f), or (g) is raised in a successive or untimely petition, the petition must set forth the reasons for not raising the claim in the previous petition or in a timely manner. If 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 petition shall be summarily dismissed.

~~c. Inference of Waiver. The court may infer from the petitioner's failure to appeal or to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so, or his failure to raise any ground then available to him in a previous Rule 32 proceeding in which he was represented by counsel, that he knowingly, voluntarily and intentionally~~

~~relinquished the right to do so.~~

d. c. Standard of Proof. The ~~prosecutor~~ state shall plead and prove any ground of preclusion by a preponderance of the evidence; ~~however, the inference of section (c) shall be considered part of the evidence.~~

Comment to Rule 32.2(a)(3):

The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must 'knowingly, voluntarily and intelligently' not raise an issue at trial, on appeal, or in a previous collateral proceeding before the issue was precluded. See, Faye v. Noya, 372 U.S. 392 (1963). While that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors. Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant 'knowingly, voluntarily and intelligently' waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim. If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceedings is so egregious as to result in

prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel.

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

Comment to Rule 32.3:

The court does not intend to restrict by this rule the constitutional scope of the writ of habeas corpus.

RULE 32.4 COMMENCEMENT OF PROCEEDINGS

a. Form, Filing and Service of Petition. A proceeding is commenced by timely filing a petition notice of post-conviction relief with the clerk of the court in which the conviction occurred, ~~on a form furnished by the clerk of that court.~~ The clerk of court shall provide notice forms for commencement of first and successive post-conviction relief proceedings. A ~~petition may be filed at any time after entry of judgment and sentence.~~ In a non-capital case, the notice must be filed within ninety days of the entry of judgment and sentence or within thirty days of the order and mandate affirming the judgment and sentence on direct appeal, whichever is the later. In a capital case, the clerk of the supreme court shall expeditiously file a notice for post-conviction 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) or (g). ~~It~~ The notice shall bear the caption of the original criminal action or actions to which it pertains. ~~Upon its receipt,~~ On receipt of the notice, the clerk shall file a copy of the petition 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, noting in the record the date and manner of sending the copies ~~in the record~~. 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 the victim on request.

b. Notification of Appellate Court. If an appeal of the ~~petitioner's~~ defendant's conviction, sentence, or both is pending, the clerk, within 5 days after the filing of the ~~petition~~ notice for post-conviction relief, shall send a copy of the ~~petition~~ notice to the appropriate Appellate Court, noting in the record the date and manner of sending the copies in the record.

c. Appointment of Counsel. Upon the filing of a timely notice in a capital case, or the first notice in a non-capital case, or the second or subsequent notice in a non-capital case which, for the first time, raises a claim of ineffective assistance of counsel, the presiding judge 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 in successive or untimely petitions 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. A non-capital defendant proceeding without counsel shall have sixty days from the filing of the notice to file a petition. In capital cases, appointed counsel for the defendant shall have one hundred twenty days from the date of appointment 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 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. 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. In non-capital cases, additional extensions of thirty days shall be granted only in extraordinary circumstances. In capital cases, additional extensions of thirty days may be granted for good cause.

d. Transcript Preparation. If the record of the trial proceedings has not been previously transcribed, the defendant may request on a form provided by the clerk of court that the record be prepared. The court shall order those portions of the record prepared that it deems necessary to resolve the issues to be raised in the petition. The preparation of the record shall be at county expense if the defendant is indigent. The time for filing of the petition shall be tolled from the time a request for the record is made until the record is prepared or the request is denied.

~~e.~~ e. Assignment of Judge. The proceeding shall be assigned to the sentencing judge where possible. If it appears that his the sentencing judge's testimony will be relevant, he that judge shall transfer the case to another judge.

~~d.~~ f. Stay of Execution of Death Sentence; Notification of by Supreme Court. If the petitioner defendant has received a sentence of death and the Supreme Court has fixed the time for execution of the sentence, the Superior Court may stay such

~~execution pending a final determination of the proceeding, in which case the clerk shall notify the Clerk of the Supreme Court, of the granting of the stay. When the proceeding is finally determined, and the time prescribed in Rule 32.9(e) has elapsed without the filing of a petition for review, the clerk shall notify the Clerk of the Supreme Court of the final determination of the proceeding. Notwithstanding the foregoing, if the petitioner has previously filed a petition under subsection (a) of this rule which has been finally disposed of pursuant to Rules 32.5 through 32.9, infra, no stay of execution shall be granted upon the filing of a second or subsequent petition except upon separate application for a stay to the Supreme Court, setting forth with particularity those issues raised which are not precluded under Rule 32.2. The Clerk of the Supreme Court shall notify the defendant, the Attorney General, and the Director of the State Department of Corrections of the granting of a stay.~~

RULE 32.5 CONTENTS OF PETITION.

~~a. Contents. The petitioner shall provide all information required by the form. The petitioner shall include every ground known to him for vacating, reducing, correcting, or otherwise changing all judgments or sentences imposed upon him, and verify under oath that he has done so. The defendant shall include every ground known to him for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him, and verify under oath that he has done so.~~ Facts within his personal knowledge shall be noted separately from other allegations of fact and shall be under oath. Affidavits, records, or other evidence currently available to the ~~petitioner~~ defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are not required. ~~Petitions which are incomplete an incomplete petition shall be returned to the petitioner defendant for completion, and shall be returned by the defendant for refiling within 30 days after receipt of the incomplete petition. If the petition is not so returned, the court shall dismiss the petition.~~

~~b. Required Appointment of Counsel. If satisfied that petitioner, upon completing under oath the questionnaire required by Rule 6.4(b), is indigent the court shall appoint counsel (1) for the first petition of any petitioner, (2) for each petition of any petitioner sentenced to death, or (3) for the~~

~~first petition raising a claim of ineffective assistance of counsel. Counsel may file an amended petition within 30 days of appointment.~~

~~e. Discretionary Appointment of Counsel. If the petitioner desires appointed counsel on a subsequent petition and if the court is satisfied that he or she is indigent, the court may appoint counsel, who may file an amended petition within thirty (30) days of appointment. If the court declines to appoint counsel the reason for such decision shall be set forth in writing.~~

RULE 32.6 ADDITIONAL PLEADINGS; SUMMARY DISPOSITION; AMENDMENTS

a. ~~Prosecutor's Response. Twenty days~~ Forty-five days after the filing of the petition, ~~or 10 days after the filing of an amended petition pursuant to Rule 32.5(b), the prosecutor state~~ shall file with the court and send to the ~~petitioner~~ defendant and ~~or counsel for the petitioner~~ defendant, a response ~~which may be supported by affidavits, and the record or such portions thereof as are appropriate or material to the questions raised in the petition. Affidavits, records or other evidence available to the state contradicting the allegations of the petition shall be attached to it. On a showing of good cause, the state may be granted a thirty day extension to file a response. Additional extensions shall be granted only in extraordinary circumstances.~~

b. ~~Petitioner's~~ Defendant's Reply. Within ~~10~~ fifteen days after receipt of the ~~prosecutor's~~ response, the ~~petitioner~~ defendant may file a reply. Extensions shall be granted only in extraordinary circumstances.

c. Summary Disposition. The court shall review the petition within ~~10~~ twenty days after the ~~petitioner's~~ defendant's reply was due. ~~If, upon~~ On reviewing the petition, response, reply, files and records, and disregarding defects of form, ~~it~~ the court shall identify all claims that are procedurally precluded under this rule. If the court, after identifying all precluded claims, determines that no remaining claim presents a material issue of fact or law exists which would entitle the petitioner defendant to

relief under this rule and that no purpose would be served by any further proceedings, ~~it may~~ the court shall order the petition dismissed ~~or grant leave to file an amended petition. Otherwise,~~ ~~the court shall direct that the proceeding continue and set a hearing within 10 days.~~ If the court does not dismiss the petition, the court shall set a hearing within thirty days on those claims that present a material issue of fact or law. If a hearing is ordered, the state shall notify the victims, upon the victims' request pursuant to statute or court rule relating to victims' rights, of the time and place of the hearing.

d. Amendment of Pleadings. ~~Amendments to pleadings shall be liberally allowed at all stages of the proceeding prior to entry of judgment.~~ After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

RULE 32.7 PREHEARING INFORMAL CONFERENCE

The court may at any time hold a ~~prehearing~~ an informal conference to expedite the proceeding. ~~at which the petitioner~~ the defendant need not be present, if ~~he~~ the defendant is represented by counsel who is present.

RULE 32.8 EVIDENTIARY HEARING

a. Plenary Hearing. The ~~petitioner~~ defendant shall be entitled to a hearing to determine issues of material fact, with the right to be present and to subpoena witnesses ~~in his behalf~~. ~~When~~ if facilities are available, the court may, in its discretion, order the hearing to be held at the place of ~~confinement~~ where the defendant is confined, giving at least 5- 15 days notice to the officer in charge of the confinement facility. A verbatim record of the hearing shall be made.

b. Evidence. The rules of evidence applicable in criminal proceedings shall apply, except that the ~~petitioner~~ defendant may be called to testify at the hearing.

c. Burden of Proof. The ~~petitioner~~ defendant shall have the burden of proving the allegations of fact by a preponderance of the evidence. If a constitutional defect is proven, the ~~prosecutor~~ state shall have the burden of proving that the defect was harmless beyond a reasonable doubt.

d. Decision. The court shall rule within 10 days of ~~submission~~ after the hearing ends. If the court finds in favor of the ~~petitioner~~ defendant, it shall enter an appropriate order with respect to the conviction, sentence or detention, any further proceedings, including a new trial and conditions of release, and other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law relating to each issue presented.

RULE 32.9 REVIEW

a. Motion for Rehearing; Response; Reply. Any party aggrieved by a final decision of the trial court in these proceedings may, within ~~10~~ fifteen days after the ruling of the court, move the court for a rehearing setting forth in detail the grounds wherein it is believed the court erred. ~~There shall be a~~ any response shall be filed within 10 fifteen days and reply within 10 days after service of such motion upon the adverse party. A reply, if any, shall be filed within 10 days after the service of the response. The filing of a motion for rehearing in the trial court is not a prerequisite to the filing of a petition for review pursuant to paragraph (c) of this rule.

b. Disposition When Motion Granted. If the motion for rehearing is granted, the court may either (1) amend its previous ruling without a hearing, or (2) grant a new hearing and then either amend or reaffirm its previous ruling. In either case, if the court amends its previous ruling, it shall set forth its reasons for amending the previous ruling. The state shall notify the victim, upon request, of any action taken by the court.

c. Petition for Review. ~~Upon denial of a~~ Within thirty days after the final decision of the trial court on the petition for post-conviction relief or the motion for rehearing, any party aggrieved may petition the appropriate Appellate Court for review of the actions of the trial court. A cross-petition for review may be filed within 15 days after service of a petition for review. The petition for review, cross-petition and all responsive pleadings filed pursuant to this rule shall be filed

with the clerk of the trial court and ~~within 10 days after the denial of the motion for rehearing.~~

1. Form and Contents. The petition or cross-petition for review shall be typewritten in pica type and must be double-spaced. They shall be on paper 8.5 By 11 inches and contain a caption setting forth the name of the court, the title of the case, the case number, and a brief descriptive title. Quotations may be single-spaced. The paper must be white, opaque, unglazed paper. An original and 6 copies shall be filed if review is being sought in the Supreme Court. An original and 4 copies shall be filed if review is being sought in the Court of Appeals. The parties shall be designated as in the trial court proceedings. The petition or cross-petition shall not exceed 20 pages, exclusive of the appendix, and shall contain concise statements of the following:

(i) A Synopsis of the trial court's ruling or rulings. Copies of the trial court's rulings entered pursuant to rules 32.6(c), 32.8(d) and 32.9(b) shall be attached to the petition or cross-petition.

(ii) The issues which were decided by the trial court and which the defendant wishes to present to the appellate court for review.

(iii) The facts material to a consideration of the issues presented for review.

(iv) The reasons why the petition should be granted.

All references to the record in the trial court shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not

incorporate any document by reference, except the appendices. If the appendices exclusive of the trial court's rulings exceed 15 pages in length, such appendices shall be fastened together separately from the petition and the copies of the trial court's rulings.

The filing of a motion for rehearing pursuant to paragraph (a) of this rule does not limit the issues that may be raised in the petition or the cross-petition for review. Failure to raise any issue that could be raised in the petition or the cross-petition for review shall constitute waiver of appellate review of that issue.

2. Service; Response; Reply. The defendant or cross-petitioner shall serve a copy of the petition or cross-petition on the adverse party. A response may be filed within 30 days from the date upon which the petition or cross-petition is served. The response shall comply with the form requirements of Rule 32.9(c)(1) and shall not exceed 20 pages, exclusive of any appendix. Appendices shall conform to the requirements of rule 32.9(c)(1). A reply, if any, may be filed within 10 days after the service of a response. The reply shall be limited to matters addressed in the response and shall not exceed 10 pages. No appendices shall be submitted with a reply.

d. Stay Pending Review. A motion for rehearing or a petition for review filed by the state pursuant to this section shall stay an order granting a new trial until final review is completed. For any other relief granted to a defendant, a stay pending further review is within the discretion of the trial or appellate court. The state shall notify the victim upon request of any

action taken.

d- e. Filing of the Record. Within 30 days after the expiration of the time for filing the last reply, the record, including the trial court file, and the reporter's transcript, and the original and all copies of the petition and cross-petition for review, responses and replies, shall be transmitted to the Appellate Court ~~as provided in Rule 31.9.~~

e- f. Disposition When Petition Granted. The Appellate Court may, in its discretion, grant review and may order oral argument upon the petition if deemed necessary and may issue such orders and grant such relief as it deems necessary and proper. The state shall notify the victim, upon request, of any action taken by the appellate court.

f- g. Reconsideration and Review of Appellate Court Decision. The provisions governing the filing of motions for reconsideration and petitions for review in criminal appeals set forth in Rules 31.18 and 31.19 shall apply to and govern motions for reconsideration and petitions for review of an appellate court decision entered pursuant to Rule 32.

g- h. Return of the Record. When the matter is determined, the clerk of the appellate court shall return the record to the appropriate clerk of the trial court for retention according to law.