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(STATE BAR NUMBER 011474)

8 IN THE SUPREME COURT OF THE STATE OF ARIZONA

9 IN THE MATTER OF:

R-15-0029


10
11 PETITION TO ADD SUBSECTION
12 32.13 TO RULE 32 OF THE
13 ARIZONA RULES OF CRIMINAL
PROCEDURE

MARICOPA COUNTY ATTORNEY'S
RESPONSE TO PETITION TO ADD
SUBSECTION 32.13 TO RULE 32 OF THE
ARIZONA RULES OF CRIMINAL
PROCEDURE

14 The Maricopa County Attorney respectfully petitions this Court to adopt a
15 modified version of the proposed petition to add new subsection Rule 32.13, relating
16 to post-conviction relief proceedings arising from Arizona Rules of Criminal
17 Procedure.
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19 Respectfully submitted this 20th of May, 2015.

21 WILLIAM G. MONTGOMERY
22 MARICOPA COUNTY ATTORNEY

23 BY 
24 Mark C. Faull
25 Chief Deputy
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1 Petitioner seeks to amend Rule 32 by adding new Rule 32.13, to specifically
2 address post-conviction relief (“PCR”) proceedings arising from misdemeanor and
3 petty criminal convictions obtained in limited jurisdiction courts. While the
4 requirements of current Rule 32 facilitate the orderly processing of PCRs arising from
5 serious felony convictions, the proposed new rule dedicated to limited jurisdiction
6 post-conviction relief (“LCPCR”) proceedings would simplify the procedures for
7 convictions on less serious offenses. While the Maricopa County Attorney supports
8 the theory behind the proposed addition of Rule 32.13, the proposed new rule needs
9 several modifications, as set forth in the attachment hereto.
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13 First, proposed Rule 32.13(a) does not provide a time limit for filing a LCPCR
14 upon conclusion of a direct appeal. A defendant who appeals his/her conviction
15 cannot raise claims of ineffective assistance of counsel on direct appeal. In *State v.*
16 *Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002), the Arizona Supreme Court
17 clarified that ineffective assistance of counsel claims are to be brought in Rule 32
18 proceedings and will not be addressed by appellate courts on appeal regardless of
19 merit. Rule 32.4(a) requires that a PCR notice in felony cases must be filed within 30
20 days after conclusion of the direct appeal. In keeping with simplifying the procedures
21 for LCPCRs, new Rule 32.13(a) should require that the LCPCR shall be filed no later
22 than 15 days after the issuance of the final order by the appellate court in a direct
23 appeal. In addition, new Rule 32.13(a) should follow Rule 32.4(a) by limiting the
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1 claims that can be raised in an untimely filed LCPCR to those cognizable under Rule
2 32.1(d) through (h).
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4 Second, proposed new Rule 32.13(b) allots the State only 20 days to respond,
5 with enlargement of time for good cause. Practically speaking, that allotment is
6 insufficient and motions for time extensions will become routine. The Maricopa
7 County Attorney recommends that the State have 30 days (which is one half of the
8 time provided in Rule 32.6(a) for felony PCR responses) to file its response to the
9 LCPCR. One reason that more time is needed is that after sentence has been imposed
10 (restitution cases excepted), the prosecutor's file is routinely closed out and sent to
11 archives. To adequately address claims raised in a LCPCR petition, it is necessary to
12 recall the file, which would cause delay in every case. Second, allegations of
13 ineffective assistance of counsel—the “bread and butter” of PCR claims—generally
14 require the prosecutor to consult with defense counsel, the timing of which is
15 completely dependent on defense counsel's availability. Third, prosecutors have a
16 constitutional obligation to consult with victims who have opted-in for post-
17 conviction notification, again the timing such consultation is subject to the victim's
18 availability. With a 30-days response time, requests for time enlargements will be the
19 exception rather than the rule.
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25 Third, new Rule 32.13(b) should specify that the LCPCR must be filed with the
26 court in which the conviction occurred and that the court shall serve a copy of the
27 LCPCR petition by email on the prosecuting attorney who represented the state at
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1 trial, or in the alternative on the appropriate county attorney or city attorney. The
2 vast majority of LCPCRs will be filed by *pro se* defendants who are unfamiliar with
3 the requirements of filing and service on opposing counsel. Also, by the time the
4 LCPCR is filed with the court, the State's file will have been closed and the
5 prosecutor may have rotated to another assignment. More importantly, there are, for
6 example, 26 justice courts in Maricopa County but no uniform rules of criminal
7 procedure and practices vary significantly between courts. A uniform practice across
8 all limited jurisdiction courts, with the court's email serving as proof of service, will
9 ensure that the proper prosecuting agency receives the petition in a timely manner in
10 light of the shorter response time for LCPCRs.¹

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14 Fourth, proposed Rule 32.13(c) makes citations to audio recordings
15 discretionary rather than mandatory. However, in *Jordan v. McClennen*, 232 Ariz.
16 572, 575, ¶ 12 (App. 2013), the Arizona Court of Appeals held that the "parties must
17 by some reasonable and understandable fashion provide the superior court on appeal
18 with references to that portion of the recording at which evidence may be found."
19 The same requirement should hold in LCPCR proceedings. As the Seventh Circuit
20 aptly stated in *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991), "[j]udges
21 are not like pigs, hunting for truffles buried in briefs" or in the record.
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26 1 Since 2012, Division One of the Arizona Court of Appeals has mandated service of special action pleadings on
27 opposing counsel by email to accommodate the short turn-around time for those proceedings. See Administrative Order
28 2012-0001 at <http://www.azcourts.gov/Portals/89/PDFs/2012-0001.pdf> This practice has proved to be efficient and
effective.

1 **IV. Conclusion.**

2 For the foregoing reasons, the Maricopa County Attorney respectfully petitions
3 this Court to petitions this Court to adopt a modified version of the proposed petition
4 to add new subsection Rule 32.13, relating to post-conviction relief proceedings
5 arising from Arizona Rules of Criminal.
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8 Respectfully submitted this 20th of May, 2015.

9 WILLIAM G. MONTGOMERY
10 MARICOPA COUNTY ATTORNEY

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NEW SUBSECTION – AS MODIFIED

Rule 32.13 Post-Conviction Relief Petition: Limited Court Offenses

The provisions of this subsection shall govern the procedure for seeking post-conviction relief for a person convicted of, or sentenced for, a misdemeanor or petty offense in a court of limited jurisdiction. This subsection shall be interpreted to provide a fair and just outcome but to avoid duplication of judicial resources or redundant issue resolution.

- a. Grounds; Time Limits; Preclusion.** The grounds for relief shall be those set forth in Rule 32.1. A limited court post-conviction relief petition (“LCPCR”) shall be filed no later than sixty days after entry of judgment and sentence OR FIFTEEN DAYS AFTER THE FINAL ORDER BY THE APPELLATE COURT. A LCPCR PETITION NOT TIMELY FILED MAY ONLY RAISE CLAIMS PURSUANT TO RULE 32.1 (D), (E), (F), (G), OR (H). Post-conviction relief shall be precluded as to any issue ~~raised~~ ~~or~~ waived AT TRIAL OR on direct appeal, adjudicated on the merits on appeal or PREVIOUS collateral proceeding, except for claims under Rule 32.1 (d), (e), (f), (g), and (h); and provided further, no post-conviction petition shall be filed while petitioner’s case is already pending on appeal. A party failing to move to withdraw from a plea of guilty or no contest pursuant to Rule 17.5 shall also be precluded from post-conviction relief.

1 **Comment**

2 *Limited court offenses categorically involve less serious violations. The*
3 *sixty-day AND THIRTY-DAY time limit^S requires due diligence by any*
4 *aggrieved party to seek relief without undue delay. Just as significant, if the*
5 *case is already on appeal, no LCPCR is to be filed UNTIL THE*
6 *CONCLUSION OF THAT APPEAL. ; ~~by rule, while a limited court case is~~*
7 *~~on appeal (restitution payable to clerk excepted), the case is already fully~~*
8 *~~stayed, rendering an added LCPCR of marginal use. Finally, some ninety-~~*
9 *~~five percent of criminal offenses in limited courts are resolved by way of~~*
10 *~~plea agreement. Rule 17.5 already provides an avenue of relief from a plea~~*
11 *~~agreement that does not meet constitutional standards. A party failing to~~*
12 *~~seek Rule 17.5 relief is similarly barred from LCPCR.~~*

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17 **b. Commencement of Proceedings; Contents; Length; Response.** A
18 LCPCR shall be commenced by the filing of a Post-Conviction Relief
19 Petition WITH THE COURT IN WHICH THE CONVICTION
20 OCCURRED. The petition shall set forth in concise terms, the basis for
21 relief. No supplemental petition shall be filed except by leave of court. The
22 petition shall not exceed eighteen pages, inclusive of attachments. Exhibits
23 already in the court file shall not be attached and shall be referred to by
24 incorporation but relevant portions may be set out in the petition. New
25 matters such as affidavits or exhibits shall be limited to the issues raised.
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1 UPON FILING, THE COURT SHALL PROMPTLY EMAIL A COPY TO
2 THE PROSECUTING ATTORNEY WHO REPRESENTED THE STATE
3 AT TRIAL, (OR IF UNAVAILABLE, TO THE APPLICABLE COUNTY
4 ATTORNEY FOR JUSTICE COURT FILINGS AND TO THE
5 APPLICABLE CITY ATTORNEY FOR CASES FILED IN MUNICIPAL
6 COURTS) AND NOTE IN THE RECORD THE DATE AND EMAIL
7 ADDRESS TO WHICH THE COPIES WERE SENT. The state may file a
8 response within ~~twenty days~~ THIRTY DAYS AFTER SERVICE OF THE
9 PETITION, with enlargement of time for good cause. THE STATE
10 SHALL SERVE A COPY OF ITS RESPONSE ON PETITIONER, OR
11 PETITIONER'S COUNSEL, BY EMAIL IF AVAILABLE OR BY
12 REGULAR POST. Failure to file a response shall not be ~~deemed a~~
13 ~~confession of error~~ AN ADMISSION THAT THE REQUESTED RELIEF
14 SHOULD BE GRANTED. No reply shall be permitted.

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20 ***Comment***

21 *This rule seeks to balance the interests of the state, the rights of any victim,*
22 *and the purpose of finality against the accused's right to a fair trial and due*
23 *process. The first change in process is that, for a limited court PCR, the*
24 *process is initiated with the filing of the actual petition WITH THE COURT,*
25 *not a "Notice of Post-Conviction Relief" and subsequent memorandum.*
26 *This two-step process is combined. The substantive PCR petition is filed at*
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1 the outset AND THE COURT SHALL SERVE THE STATE BY EMAIL
2 WITH THE PETITION TO EXPEDITE THE PROCESS. THE COURT'S
3 EMAIL TO THE PROSECUTOR AND/OR COUNTY ATTORNEY OR CITY
4 ATTORNEY SHALL SERVE AS PROOF OF SERVICE. For misdemeanor
5 and petty offenses, the content of the petition need not set forth papers and
6 pleadings already within the judicial knowledge of court file and should not
7 require extensive elaboration. The state may, but is not obligated to
8 respond; no reply is to be filed. Further adjudication of a limited court
9 matter may then receive further appellate review at the superior court level
10 or beyond as permitted by existing rules.

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14 **c. Limited Transcript Use; Right to Court Appointed Counsel**
15 **Conditional on Original Charges.** For matters where the proceedings are
16 less than ninety minutes duration and for which ~~there is~~ an audio recording
17 was made, no transcript shall be required. Petitioner shall be provided a
18 copy of any audio and may MUST refer to SPECIFIC portions of the
19 proceedings **RECORDING** in the petition. For matters exceeding ninety
20 minutes, petitioner shall provide only those portions of the transcript
21 relevant to the issues raised. If indigent, petitioner may obtain a waiver of
22 any audio copy or transcript costs. A petitioner shall not be eligible for
23 court appointed counsel for PCR relief if the original offense charged did
24 not mandate jail or probation or if jail or probation were not imposed in the
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1 original judgment or sentence. A court may appoint counsel in the interests
2 of justice however. A party seeking court appointed counsel shall request
3 same in writing accompanied with a court financial statement form, at least
4 twenty-five days before the deadline to file a post-conviction relief petition
5 and the court shall rule on same within five calendar days of filing.
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8 ***Comment***

9 *This subparagraph accomplishes various objectives: first, where an audio*
10 *recording is available (~~by rule not mandated for certain proceedings such~~*
11 *as change of pleas), for summary matters under ninety minutes, THE*
12 *PARTIES MUST BY SOME REASONABLE AND UNDERSTANDABLE*
13 *FASHION PROVIDE THE COURT WITH REFERENCES TO THAT*
14 *PORTION OF THE RECORDING AT WHICH EVIDENCE MAY BE*
15 *FOUND. (JORDAN V. McCLENNEN, 232 Ariz. 572, 575, ¶ 12 (App.*
16 *2013)). ~~reference to the audio recording;~~ second, unlike the other
17 *provisions of Rule 32, this subparagraph on court appointed counsel*
18 *corrects an imbalance. If petitioner was not exposed to jail or probation in*
19 *the underlying case, that status quo should obtain for post-conviction relief*
20 *purposes to avoid unintended betterment, unless in the interests of justice*
21 *the court finds independent grounds to provide court appointed counsel for*
22 *petitioner. Petitioner's request for court appointed counsel is required at*
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1 *an early stage of the sixty-day time limit to promote due diligence in seeking*
2 *relief and to improve the reviewing process at the outset and avoid delay.*

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4 **d. Oral Argument and Evidentiary Hearings.** A party may request oral
5 argument, which may be granted if the court determines additional
6 argument would assist in its determination. A party seeking an evidentiary
7 hearing shall set forth same in a separate pleading, not to exceed five pages,
8 stating what evidentiary matters are clearly shown to be necessary for a fair
9 adjudication of the petition. The court may grant an evidentiary hearing,
10 and the scope of fact issues therein, within its discretion.

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13 ***Comment***

14 *This provision on oral argument and evidentiary hearing is based on*
15 *reason. Petitioner, as proponent, has the burden to identify grounds for an*
16 *evidentiary hearing that will genuinely advance the content of a good faith*
17 *petition; the evidentiary hearing should not be a fishing expedition. It*
18 *should also be kept in mind that, as noted, most limited court matters result*
19 *in written pleas such that the purpose of an evidentiary hearing to re-*
20 *litigate the court's written file will have a smaller scope, especially*
21 *recalling the explicit availability of Rule 17.5.*

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25 **e. Summary Disposition; No Motion for Rehearing; Format; Distribution;**
26 **Notices.** After review of the petition, any response, oral argument, and
27 evidentiary hearing matters, if any, the court may enter appropriate orders
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1 on the motion, including dismissal of the petition. No motion for rehearing
2 or reconsideration shall be filed. All other review of the petition and its
3 merits shall be by available appellate procedure. Document format and
4 distribution of copies of pleadings to the court, the prosecutor, and any
5 victim shall be in accordance with the general rules of criminal procedure.
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8 ***Comment***

9 *As noted above, given the nature and mitigated severity of risk of*
10 *misdemeanors and petty offenses, and the competing social values involved,*
11 *the merits of any petition should be addressed in accordance with due*
12 *process but not at the expense of delay or inefficient use of judicial*
13 *resources. From the outset of any criminal matter, both parties, the state*
14 *and the defendant, have an obligation to understand the consequences of*
15 *any disposition being challenged but still be bound by adjudications that*
16 *meet the standards of Arizona's comprehensive criminal rule procedures.*
17 *Thus, for limited court matters, summary disposition is appropriate;*
18 *motions for rehearing add little to the trial court's consideration of the*
19 *issues and, unlike felonies, no rehearing or reconsideration is warranted.*
20 *Rule 32 has provisions for potential notice to the attorney general and*
21 *county attorney. Distribution under this subsection need only be to the*
22 *immediate parties as necessary.*
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