

*Law Office of Katia Mehu*

P.O. Box 17787 • Phoenix, AZ • 85011-7787

---

February 15, 2019

Hon. Joseph Welty, Chair  
Task Force on the Arizona Rules of Criminal Procedure  
1501 West Washington Street, Suite 410  
Phoenix, Arizona 85007  
E-mail: mmeltzer@courts.az.gov

Members of the Rule 32 Task Force:

To give full effect to the Arizona Supreme Court's Administrative Order No. 2018 – 07 stated goal of improving upon the objectives of Rule 32 and the post-conviction relief process, Rule 32.1(a) (Scope of Remedy) and Rule 32(6)(c) (Counsel's Notice of No Colorable Claims) should clearly inform Petitioners of the constitutional rights subject to review in post-conviction relief proceedings.

Constitutional rights attendant to criminal proceedings encompass rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.

*Carter v. Illinois*, 329 U.S. 173, 175–76 (1946), directs States to provide a mode by which federal constitutional rights are to be vindicated after conviction.

Arizona has chosen to provide Rule 32 proceedings as that vehicle for collateral review.

Rule 32.1(a) of the Arizona Rules of Criminal Procedure provides that a Petitioner may seek relief on grounds that a conviction or sentence is in violation of the United States or Arizona constitutions.

In practice, however, the only constitutional right litigated in Rule 32 proceedings is ineffective assistance of counsel.

With the exception of constitutional rights requiring express waiver, all other constitutional claims are per se precluded under the auspices of the preclusion rule (Rule 32.2) which provides that a petitioner is precluded from relief under Rule 32 based on any ground: (1) still raisable on direct appeal under Rule 31 or in a post-trial motion under Rule 24; (2) finally adjudicated on the merits in an appeal or in any previous collateral proceeding; or (3) waived at trial, on appeal, or in any previous collateral proceeding.

However, the Arizona Rules of Criminal Procedure do not (and rightly so) direct a petitioner to raise constitutional claims on direct appeal.

Rule 31.10(7)(A)—giving effect to A.R.S. § 13-4033(A)—only identify the *types of proceedings* a petitioner may appeal therefrom: (1) a final judgment of conviction or verdict of guilty expect

insane; (2) an order denying a motion for a new trial; (3) an order made after judgment affecting the substantial rights of the party; and (4) a sentence on the grounds that it is illegal or excessive.

Petitioners contesting their convictions in Arizona are not being accorded the full panoply of due process rights conferred by the federal and the state constitutions where the rule of preclusion is automatically applied to all constitutional claims except ineffective assistance of counsel claims and claims requiring express waiver of constitutional rights.

This is particularly problematic where federal courts do not examine the merits of Fourth Amendment claims in a state federal habeas corpus petition. *Stone v. Powell*, 428 U.S. 465, 494 (1976). But for review in the occasional capital case, claims premised on violations of the Fourth Amendment escape review if not raised on direct appeal and therefore result in denial of full and fair litigation as the Supreme Court of the United States contemplates.

Examining Rule 32 within the context of an ineffective assistance of counsel claim, the Supreme Court of the United States noted that while a State may defer constitutional claims to collateral proceedings, that practice "is not without consequences for the State's ability to assert a procedural default in later proceedings." *Martinez v. Ryan*, 566 U. S. 1, 13 (2012).

Accordingly, Rule 32.1(a) and Rule 32(6)(c) should clearly inform Petitioners of the constitutional rights subject to review in post-conviction relief proceedings.

Regards,

/s/ Katia Méhu  
LAW OFFICE OF KATIA MEHU