determines there are no colorable claims which can be raised on the defendant's behalf, counsel shall file a notice advising the court of this determination. Counsel's role is then limited to acting as advisory counsel until the trial court's final determination. Upon receipt of the notice, the court shall extend the time for filing a petition by the defendant in propria persona. The extension shall be 45 days from the date the notice is filed. Any extensions beyond the 45 days shall be granted only upon a showing of extraordinary circumstances.

A defendant proceeding without counsel shall have sixty days to file a petition from the date the notice is filed or from the date the request for counsel is denied.

d. Transcript Preparation.

If the transcripts of the trial court proceedings have not been previously transcribed, the defendant may request on a form provided by the clerk of court that the transcripts be prepared. The court shall expeditiously review the request and order only those transcripts prepared that it deems necessary to resolve the issues to be raised in the petition. The preparation of the transcripts 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 transcripts is made until the transcripts are prepared or the request is denied. Transcripts shall be prepared and filed within sixty days of the order granting the request.

e. Assignment of Judge.

The proceeding shall be assigned to the sentencing judge where possible. If it appears that the sentencing judge's testimony will be relevant, that judge shall transfer the case to another judge.

f. Stay of Execution of Death Sentence; Notification by Supreme Court.

If the defendant has received a sentence of death and the Supreme Court has fixed the time for execution of the sentence, no stay of execution shall be granted upon the filing of a successive petition except upon separate application for a stay to the Supreme Court, setting forth with particularity those issues 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.

§ 5:30 Arizona Rule of Criminal Procedure 32—Rule 32.4—Case law

For case law on Rule 32.4, see e.g., *Isley v. Arizona Dept. of Corrections*, 383 F.3d 1054 (9th Cir. 2004) (Arizona guarantees a right to counsel for all first-time Rule 32 petitioners and provides for the appointment of counsel where the petitioner is indigent, Rule 32.4(c), Ariz. R. Crim. Proc.; therefore, Arizona's rules require all petitioners to file a "Notice of Post-Conviction Relief" to alert the Superior Court that it might need to appoint counsel; that Notice must contain a request for relief from the judgment of conviction; accordingly, in Arizona, the filing of the Notice is a critical stage of the postconviction relief proceeding; the postconviction process cannot go forward until the Notice is filed and the guarantee of counsel fulfilled; the language and structure of the Arizona postconviction rules demonstrate that the proceedings begin with the filing of the Notice; Rule 32.4(a) provides that a state postconviction "proceeding is commenced by timely filing a notice of postconviction relief with the court in which the conviction occurred;" for defendants like Isley who plead no contest, Rule 32 notices must be filed within 90 days of sentencing; with the filing of the Notice, Arizona's mechanism for postconviction relief is set in motion; it is only after filing of the Notice that indigent defendants are entitled to have counsel appointed and that the time limitation for filing of the formal petition begins to run, Rule 32.4(c)).

§ 5:31 Arizona Rule of Criminal Procedure 32—Text of Rule 32.5: Contents of Petition

Rule 32.5. Contents of Petition

The defendant shall include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed upon him or her, and certify that he or she has done so. Facts within the defendant's 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 defendant supporting the allegations of the petition shall be attached to it. Legal and record citations and memoranda of points and authorities are required. In Rule 32 of-right and non-capital cases, the petition shall not exceed 25 pages. The response shall not exceed 25 pages, and any reply shall not exceed 10 pages. In capital cases, the petition shall not exceed 40 pages. The response shall not exceed 40 pages, and any reply shall not exceed 20 pages. A petition which fails to comply with this rule shall be returned by the court to the defendant for revision with a minute entry specifying how the petition fails to comply with the rule. A petition that has been revised to comply with the rule shall be returned by the defendant for refiling within 30 days after defendant's receipt of the non-complying petition. If the petition is not so returned, the court shall dismiss the proceedings with prejudice. The period for response by the state shall begin on the date a returned petition is refiled.

§ 5:32 Arizona Rule of Criminal Procedure 32—Text of Rule 32.6: Additional Pleadings

Rule 32.6 Additional Pleadings; Summary Disposition; Amendments

a. Prosecutor's Response. Forty-five days after the filing of the petition, the state shall file with the court and send to the defendant or counsel for the defendant, a response. 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 upon a showing of extraordinary circumstances.

b. Defendant's Reply. Within fifteen days after receipt of the response, the defendant may file a reply. Extensions shall be granted only upon a showing of extraordinary circumstances.

c. Summary Disposition. The court shall review the petition within twenty days after the defendant's reply was due. On reviewing the petition, response, reply, files and records, and disregarding defects of form, 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 which would entitle the defendant to relief under this rule and that no purpose would be served by any further proceedings, the court shall order the petition dismissed. 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. After the filing of a postconviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

§ 5:33 Arizona Rule of Criminal Procedure 32—Text of Rule 32.7: Informal Conference

Rule 32.7. Informal Conference

The court may at any time hold an informal conference to expedite the proceeding. In a capital case, the court shall hold an informal conference within 90 days after the appointment of counsel on the first notice of a petition for post-conviction relief. The defendant need not be present if the defendant is represented by counsel who is present.

§ 5:34 Arizona Rule of Criminal Procedure 32—Text of Rule 32.8

Rule 32.8. Evidentiary Hearing

a. Evidentiary Hearing. The defendant shall be entitled to a hearing to determine issues of material fact, with the right to be present and to subpoena witnesses. If facilities are available, the court may, in its discretion, order the hearing to be held at the place where the defendant is confined, giving at least 15 days notice to the officer in charge of the confinement facility. In superior court, the hearing shall be recorded.

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

c. Burden of Proof. The defendant shall have the burden of proving the allegations of fact by a preponderance of the evidence. If a constitutional defect is proven, the 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 after the hearing ends except in extraordinary circumstances where the volume of the evidence or the complexity of the issues require additional time. If the court finds in favor of the 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.

e. Transcript. The court may, and shall upon request of a party within the time limit for filing a petition for review, order that a transcript of the evidentiary hearing be prepared. The preparation of the evidentiary hearing transcript shall be at county expense if the defendant is indigent.

§ 5:35 Arizona Rule of Criminal Procedure 32—Text of Rule 32.8—Rule 32.8: Evidentiary hearings

Evidentiary hearings in Rule 32 proceedings are governed by Rule 32.8, Ariz. R. Crim. Proc.

§ 5:36 Arizona Rule of Criminal Procedure 32—Text of Rule 32.8—Rule 32.8: Evidentiary hearings—Case law

For case law on Rule 32 evidentiary hearings in Arizona, see,

e.g., *State v. Runningeagle*, 176 Ariz. 59, 859 P.2d 169 (1993) (Rule 32 movant raising ineffective counsel claim is entitled to an evidentiary hearing only when he presents a colorable claim—one that if the allegations are true, might have changed the outcome); *State v. Watton*, 164 Ariz. 323, 793 P.2d 80 (1990) (defendant is entitled to an evidentiary hearing in a Rule 32 proceeding when he presents a colorable claim, that is, a claim which, if defendant's allegations are true, might have changed the outcome; when doubt exists, a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review); *State v. Bilke*, 162 Ariz. 51, 781 P.2d 28 (1989) (Rule 32 petitioner entitled to evidentiary hearing on newly discovered evidence that might have affected sentence imposed); *State v. D'Ambrosio*, 156 Ariz. 71, 750 P.2d 14 (1988) (under Rule 32, a defendant is entitled to an evidentiary hearing if his petition for postconviction relief presents a colorable claim, that is, a claim which if his allegations are true might have changed the outcome; decision as to whether a petition for postconviction relief presents a colorable claim is, to some extent, a discretionary decision for the trial court; the trial court must be mindful, however, that when doubt exists, a hearing should be held to allow the defendant to raise the relevant issues, to resolve the matter, and to make a record for review).

§ 5:37 Arizona Rule of Criminal Procedure 32—Appeals

There is no right to appeal a final judgment of the superior court granting or denying Rule 32 relief. The party dissatisfied with the judgment may file a motion for rehearing in the superior court within 15 days of the court's ruling. Rule 32.9(a), Ariz. R. Crim. Proc. Within 30 days of the final decision of the superior court on the petition for postconviction relief or of the denial of the rehearing motion, any aggrieved party may petition the appropriate appellate court for review of the actions of the convicting court. Rule 32.9(c), Ariz. R. Crim. Proc. The filing of a motion for rehearing is not a prerequisite to the filing of a petition for review. Rule 32.9(a), Ariz. R. Crim. Proc.

In a noncapital cases, the petition for review of the superior court's final decision in a Rule 32 proceeding is filed in the Arizona Court of Appeals, whose decision may itself be reviewed by the Arizona Supreme Court on a further petition for review. In a death sentence case, the petition for review of the final decision of the superior court in a Rule 32 proceeding is filed directly in the Arizona Supreme Court.

In Arizona the right to a direct appeal from the judgment of conviction is a state constitutional right. Ariz. Const. art. II, § 2

(in Arizona criminal prosecutions, the accused shall have the right to appeal in all cases).

§ 5:38 Arizona Rule of Criminal Procedure 32—Appeals—Text of Rule 32.9

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 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. No response to a motion for rehearing will be filed unless requested by the court, but a motion for rehearing will not be granted in the absence of such a response. 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. Within thirty days after the final decision of the trial court on the petition for postconviction 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 in the appellate court. Within 3 days after filing a petition or cross-petition for review, the petitioner and cross-petitioner, if any, shall file a notice of such filing with the trial court. The notice of filing may include a designation of record adding to the record defined in Rule 32.9(e) any additional transcripts of trial court proceedings that were prepared pursuant to Rule 32.4(d) or that were otherwise available to the trial court and the parties and that are material to the issues raised in the petition for review. Motions for extensions of time to file petitions or cross-petitions shall be filed in and ruled upon by the trial court. All other motions shall be filed in the court in which the petition is to be filed.

1. Form and contents. The petition or cross-petition for review shall comply with the form requirements of Rule 31.12

of the rules of criminal appellate procedure and contain a caption setting forth the name of the appellate court, the title of the case, a space for the appellate court case number, the trial court case number and a brief descriptive title. An original and seven copies of the petition and an original and one copy of the appendix, if any, shall be filed if review is being sought in the Supreme Court. An original and four copies of the petition and an original and one cop of the appendix, if any, shall be filed if review is being sought in the Court of Appeals. An original and one copy shall be filed if review is being sought in the superior court. 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, shall not have a cover or be bound, but shall be fastened with a single staple in the upper left corner, and shall contain the following:

In Rule 32 of-right and non-capital cases, an appendix is not required, but the petition for review shall contain specific references to the record.

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.

(i) Copies of the trial court's rulings entered pursuant to rules 32.6(c), 32.8(d) and 32.9(b).

(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. In capital cases 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.

2. Service; Response; Reply.

The petitioner 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 also comply with the form requirements of Rule 32.9(c)(1). 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.

e. Filing of the Record.

In Rule 32 of-right and non-capital cases, within 45 days after the receipt of the notice of filing of a petition for review, the record, including the trial court file and the reporter's transcript, shall be transmitted to the appellate court.

In capital cases, the record of the postconviction proceedings shall not be transmitted to the appellate court unless requested by that court. If requested by the appellate court, the record shall consist of copies of the notice of postconviction relief, the petition for postconviction relief, response and reply, all motions and responsive pleadings filed and all minute entry orders issued in the postconviction proceedings, plus the reporter's transcript and any exhibits admitted by the trial court in the postconviction proceedings.

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.

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.

h. Return of the Record.

In Rule 32 of-right-and non-capital cases, when the matter is determined, the clerk of the appellate court shall return the rec-

appropriate trial court for retention according to law. In capital cases, the clerk of the appellate court shall return any exhibits to the appropriate trial court.

§ 5:39 Arizona Rule of Criminal Procedure 32—Text of Rule 32.10: review of intellectual disability determination

Rule 32.10. Review of intellectual disability determination

Within 10 days after the trial court makes a finding on intellectual disability, the state or defendant may file a petition for special action with the court of appeals. The filing of the petition for special action is governed by the rules of procedure for special actions, except that the court of appeals shall exercise jurisdiction and decide the issue raised.

§ 5:40 Arizona Rule of Criminal Procedure 32—Text of Rule 32.11

Rule 32.11. Extensions of time; notification of victims

In any capital case, if the victim has filed a notice of appearance as specified in A.R.S. § 13-4234.01, a party seeking an extension of time to file a brief must provide notice of the request to the victim. Notice shall be provided through the prosecutor's office handling the post-conviction relief proceeding, unless the victim specifies a different method in the notice of appearance. The victim may specify in the notice of appearance whether notification should be served directly on the victim or on another person, including the prosecutor, and whether service may be made electronically, by telephone, or by regular mail. If the victim has requested direct notification, the party seeking an extension of time shall serve notice on the victim within 24 hours of filing the extension request. If the prosecutor has the duty to notify the victim on behalf of the defendant, the prosecutor shall serve notice within 24 hours of receipt of the extension request. Service shall be made in the manner specified in the notice of appearance, or if no method is specified, by regular mail. In ruling on any request for an extension of a time limit set in this rule, the court shall consider the rights of the defendant and any victim to prompt and final conclusion of the case.

§ 5:41 Writ of habeas corpus under Arizona Statutes §§ 13-4121 et seq.

The writ of habeas corpus is an available postconviction remedy in Arizona.

Arizona's statutory provisions relating to the writ of habeas corpus may be found at Ariz. Rev. Stat. Ann. §§ 13-4121 et seq. See also Ariz. Const. art. 6, § 5(1) (state supreme court has original jurisdiction in habeas corpus); Ariz. Const. art. 6, § 18 (superior court or any judge thereof may issue writs of habeas corpus in behalf of a person held in actual custody within the county); Rule 1, Ariz. Sup. Ct. R., (regulating postconviction habeas corpus petitions filed originally in the Arizona Supreme Court).

A petition for a writ of habeas corpus may be filed originally in either the appropriate superior court or in the Arizona Supreme Court. In the Rules of the Arizona Supreme Court there is a model form of petition for a writ of habeas corpus for use in postconviction habeas corpus relief cases filed originally in the Arizona Supreme Court. 17A A.R.S. Sup.Ct.Rules, Form 1.

The final judgment entered in a habeas corpus proceeding in the superior court is appealable to the Arizona Court of Appeals. Ariz. Rev. Stat. Ann. § 12-2101(L).

Prior to the original adoption of Rule 32 in 1973, the writ of habeas corpus could be used in Arizona as a remedy to attack the validity of a criminal conviction or sentence only on jurisdictional grounds, although it seems to have been recognized that under some circumstances a violation of a constitutional right might amount to a jurisdictional error.

§ 5:42 Writ of habeas corpus under Arizona Statutes §§ 13-4121 et seq—Arizona Rule of Criminal Procedure 32 and habeas corpus relief

The Rule 32 remedy does not displace the writ of habeas corpus as a postconviction remedy. Rule 32.3, Ariz. R. Crim. Proc. However, if a convicted person files a habeas corpus petition seeking to attack his or her conviction or sentence, the habeas petition shall be transferred to the convicting court and treated as a Rule 32 petition for postconviction relief. Rule 32.3, Ariz. R. Crim. Proc.

The writ of habeas corpus remains a postconviction remedy in Arizona, but is available only in certain circumstances where collateral relief is sought on grounds unrelated to the validity of the conviction or sentence, or where the relief sought is otherwise outside the scope of Rule 32.

§ 5:43 Writ of habeas corpus under Arizona Statutes §§ 13-4121 et seq—Case law

For case law on the availability of postconviction habeas corpus relief in Arizona see, e.g., *State v. Cowles*, 207 Ariz. 8, 82 P.3d 369 (Ct. App. Div. 1 2004) (inmate brought habeas corpus proceeding challenging calculation of his community supervision period by Department of Corrections; community supervision is simply a part of the sentence that has to be served in the community after completion of a period of imprisonment or served in prison if there is a refusal to sign and abide by the release conditions; the order of the superior court granting habeas relief is vacated).

§ 5:44 Motion to vacate judgment under Arizona Rule of Criminal Procedure 24.2

Another postconviction remedy available in the courts of Arizona is the motion to vacate judgment, authorized by Rule 24.2, Ariz. R. Crim. Proc. This remedy is available in the convicting court.

§ 5:45 Motion to vacate judgment under Arizona Rule of Criminal Procedure 24.2—Text

As amended, Rule 24.2 provides, in part that:

Rule 24.2. Motion to vacate judgment

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

(1) That it was without jurisdiction of the action;

(2) That newly discovered material facts exist, under the standards of Rule 32.1; or

(3) That the conviction was obtained in violation of the United States or Arizona Constitutions.

. . .

d. Appeal From Decision on Motion. In noncapital cases, the party appealing a final decision on the motion shall file the notice of appeal with the clerk of the trial court within 20 days after entry of the decision in superior court, or within 14 calendar days after entry of the decision in a court of 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.

§ 5:46 Motion to vacate judgment under Arizona Rule of Criminal Procedure 24.2—Case law

For case law on Rule 24.2, see, e.g., *State v. Vega*, 2008 WL 2554961 (Ariz. Ct. App. Div. 2 2008) (motion to vacate judgment must be made no later than 60 days after the entry of judgment and sentence; supplemental motion to vacate judgment, in which petitioner raised new claims of prosecutorial misconduct, filed five months after his sentencing was untimely).

§ 5:47 Motions to correct unlawful sentence or to correct a sentence imposed in an unlawful manner under Arizona Rule of Criminal Procedure 24.3

Two additional Arizona postconviction remedies are authorized by Rule 24.3, Ariz. R. Crim. Proc., as amended effective June 1, 2004. These remedies are (1) the motion to correct unlawful sentence, and (2) the motion to correct a sentence imposed in an unlawful manner. They are both available in the convicting court.

"This rule allows the court to correct an unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and pronouncement of sentence, but before the perfection of the defendant's appeal, whichever is sooner. An unlawful sentence is one not authorized by law; a sentence imposed in an unlawful manner is one imposed without due regard to the procedures required by statute or Rule 26. The Rule 24.2 motion to vacate judgment attacks the validity of the judgment itself; the Rule 24.3 motion assumes the correctness of the judgment, but attacks the validity of the sentence." Ariz. R. Crim. Proc 24.3 Comment.

§ 5:48 Motions to correct unlawful sentence or to correct a sentence imposed in an unlawful manner under Arizona Rule of Criminal Procedure 24.3—Text

As amended, Rule 24.3 provides:

Rule 24.3. Modification of sentence

The court may correct any unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and sentence but before the defendant's appeal, if any, is perfected. In noncapital cases, the party appealing a final decision under this rule shall file the notice of appeal with the clerk of the trial court within 20 days after entry of the decision in superior court, or within 14 calendar days after entry of the decision in a court of limited jurisdiction. In capital cases, the court, after denying modification of a sentence of death, shall order the clerk to file a notice of appeal from the denial.

of Criminal Procedure 24.4

In Arizona, the motion to correct clerical error is a postconviction remedy authorized by Rule 24.4, Ariz. R. Crim. Proc. Rule 24.4 is clearly patterned after Rule 36, Fed. R. Crim. Proc. The Rule 24.4 remedy is available in the convicting court.

§ 5:50 Motion to correct clerical error under Arizona Rule of Criminal Procedure 24.4—Text

Rule 24.4 provides:

Rule 24.4. Clerical mistakes

Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time after such notice, if any, as the court orders.

§ 5:51 Motion to correct clerical error under Arizona Rule of Criminal Procedure 24.4—Case law

For case law on Rule 24.4, see, e.g., *State v. Chavarria*, 116 Ariz. 401, 569 P.2d 831 (1977) (when a party believes that there is a clerical error in the record, the proper procedure is to bring a motion in the trial court under Rule 24.4, so that the trial court may determine if in fact there is an error in the record and, if so, order the error corrected); *State v. Hanson*, 138 Ariz. 296, 674 P.2d 850 (Ct. App. Div. 2 1983) (Rule 24.4 allows the court to correct clerical mistakes in the record "arising from oversight or omission" at any time).

§ 5:52 Special actions under Arizona Rule of Special Action 1(a)

Another postconviction remedy available in the Arizona courts under some circumstances is the special action. *State v. Soriano*, 217 Ariz. 476, 176 P.3d 44, 46 (Ct. App. Div. 2 2008) (where there is no equally plain, speedy, and adequate remedy by appeal, court may exercise special action jurisdiction). Special actions are governed by Arizona's Rules of Procedure for Special Actions.

"'Special Action' is a label assigned to this state's simplified procedural rules for obtaining extraordinary judicial relief. Special action proceedings have replaced the traditional proceedings of certiorari, mandamus, and prohibition, but have not enlarged the scope of relief formerly available under those writs." Ariz.R.P.Spec. Act. 1.

§ 5:53 Special actions under Arizona Rule of Special Action 1(a)—Text

Rule 1(a), Ariz. R. Proc. Special Actions, provides: "Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule . . . ." Only three issues are cognizable in special action proceedings: (1) whether the defendant has failed to exercise discretion he has a duty to exercise, or has failed to perform a duty; (2) whether the defendant has proceeded or threatens to proceed without or in excess of jurisdiction or legal authority; or (3) whether a determination was arbitrary or an abuse of discretion. Rule 3, Ariz. R. Proc. Special Actions. A special action may be initiated either as a matter of right by complaint as a civil action in the superior court, or by discretionary petition in the state court of appeals or the state supreme court. Rules 4(a), (b) and 7(a), Ariz. R. Proc. Special Actions. Although the Arizona Court of Appeals lacks jurisdiction over direct appeals from death sentences, jurisdiction granted to that court over special actions necessarily includes special actions arising out of capital cases, and this grant to the Court of Appeals of broad jurisdiction over special actions necessarily includes special actions arising out of capital cases; in most circumstances, therefore, a petitioner, including a petitioner involved in capital litigation, should file a special action in the Court of Appeals rather than the Arizona Supreme Court. *State v. Arellano*, 213 Ariz. 474, 143 P.3d 1015 (2006).

§ 5:54 Special actions under Arizona Rule of Special Action 1(a)—Habeas corpus

A petition for a writ of habeas corpus may be deemed by the court to be a petition for special action. *Pickett v. Boykin*, 118 Ariz. 261, 576 P.2d 120 (1978) (habeas corpus was not proper remedy to require sheriff to allow petitioner trusty status and two-for-one time and to require that order be entered modifying sentence imposed; petitioner should have asked for relief by special action, but court would treat petition as one asking for relief by special action); *Brown v. State*, 117 Ariz. 476, 573 P.2d 876 (1978) (habeas petitioner seeks to require the Department of Corrections to credit him with two-for-one time while he is in protective custody at the state prison; petitioner is not entitled to habeas corpus relief because he does not allege any facts which show that he is entitled to immediate release from custody; despite the fact that the petitioner is not entitled to relief by habeas corpus we have held in the past that where relief may be granted by extraordinary writ (special action), this court may grant the appropriate relief even

though the writ applied for or the motion made is not aptly titled we look to substance, not to form; we therefore will treat the petition as a petition for a special action).

§ 5:55 Special actions under Arizona Rule of Special Action 1(a)—Grounds for relief—Limited review of actions by the Arizona Board of Pardons and Paroles

A special action may be used as a postconviction remedy under several circumstances.

First, it may be used to obtain a limited review of the actions of the Arizona Board of Pardons and Paroles. *Kelley v. Arizona Dept. of Corrections*, 154 Ariz. 476, 744 P.2d 3 (1987) (where, as here, the court of appeals has original appellate jurisdiction, it is ordinarily the court to which the special action must be presented in the first instance; however, if extremely unusual circumstances make it appropriate for us to do so, we may, in our discretion, entertain the special action directly; inmate brought special action seeking release from custody of Department of Corrections, pending appeal by Arizona Board of Pardons and Paroles of judgment, entered by superior court in a special action proceeding, which ruled that inmate's street time had been improperly forfeited by Board of Pardons and Paroles and directed that inmate be released; relief granted); *Cooper v. Arizona Bd. of Pardons and Paroles*, 149 Ariz. 182, 717 P.2d 861 (1986) (parole denial claim; the courts of this state cannot act as a superparole board; due process requires that judicial review be available to insure that the requirements of due process have been met and that the parole board has acted within the scope of its powers; the courts may compel the Parole Board to act, but the courts cannot compel the Board to act in any particular manner; we believe, therefore, that we have jurisdiction since we are considering only whether the Board has followed the due process required by our parole statutes).

§ 5:56 Special actions under Arizona Rule of Special Action 1(a)—Grounds for relief—Unlawful actions of prison officials

Second, a special action may be used to attack the unlawful actions of prison officials. *Crumrine v. Stewart*, 200 Ariz. 186, 24 P.3d 1281 (Ct. App. Div. 2 2001) (claim by inmate that prison authorities should have applied his earned release credits to his kidnapping sentence so that he could begin serving his armed robbery sentence; to be entitled to special action relief, inmate was required to show that prison authorities failed to exercise their discretion, failed to perform a duty as to which they had no discretion, or abused their discretion).

§ 5:57 Special actions under Arizona Rule of Special Action 1(a)—Grounds for relief—Used to attack certain decisions of convicting court

Third, a special action may be used to attack certain sentencing decisions made by the convicting court. *Smith v. Superior Court of State In and For Coconino County*, 151 Ariz. 67, 725 P.2d 1101 (1986) (special action originally filed in state supreme court used to invalidate requirement that defendant be sterilized as condition of sentence reduction); *Jackson v. Schneider ex rel. County of Maricopa*, 207 Ariz. 325, 86 P.3d 381 (Ct. App. Div. 1 2004) (petitioner was convicted of a misdemeanor and sentenced to lifetime probation, pursuant to a plea agreement; three years later, after the convicting court denied his motion to terminate probation, petitioner filed this special action; the sentence is illegal because it exceeded the maximum allowed by law; relief granted).

§ 5:58 Special actions under Arizona Rule of Special Action 1(a)—Grounds for relief—Other grounds for relief

Fourth, a special action may be used in certain other respects as a postconviction remedy. *Conway v. Ryan*, 2012 WL 786326 (D. Ariz. 2012), report and recommendation adopted, 2012 WL 786278 (D. Ariz. 2012) (filed Special Action in the Arizona Superior Court did not toll the AEDPA limitations period because such a proceeding is not considered a properly filed application for State postconviction relief or other appropriate form of collateral review); *Brewer v. Rees ex rel. County of Maricopa*, 228 Ariz. 254, 265 P.3d 436 (Ct. App. Div. 1 2011), review denied, (Mar. 20, 2012) (special action review was appropriate to review trial court's order that defendant in drug prosecution be held without bail; although any issues involving defendant's pretrial incarceration or release would have become moot upon trial of the charges, this purely legal issue was one of statewide importance and could readily recur in other cases); *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, 262 P.3d 238 (Ct. App. Div. 1 2011) (special action petition seeks extraordinary relief that is usually granted only when justice cannot be obtained by other means; Court of Appeals would exercise special action jurisdiction over State's challenge to trial court's interlocutory order that State compensate six physicians who treated murder victim as expert witnesses if called to testify at criminal trial, where State could not appeal from interlocutory order, and issue raised was one of first impression and of statewide importance affecting numerous cases); *Bill v. Rees*, 2009 WL 223133 (Ariz. Ct. App. Div. 1 2009) (no adequate remedy by appeal to order requiring defendant to undergo examination by a psychologist, jurisdiction of special action accepted

by appellate court), *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 165 P.3d 238 (Ct. App. Div. 1 2007) (special action jurisdiction appropriate to review trial court's denial of motion of state seeking to preclude defendant charged with manslaughter from introducing evidence of alleged car chase on ground that it went to justification defense).

§ 5:59 Writ of error coram nobis

Prior to adoption of Rule 32, Ariz. R. Crim. Proc., the common law writ of error coram nobis was recognized as an available postconviction remedy in Arizona. (In 1961, Rule 60(c), Ariz. R. Civ. Proc., was adopted, relating to relief from final judgments based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud. From the time of its adoption until 1973, Rule 60(c), Ariz. R. Civ. Proc., was deemed to authorize a motion remedy that applied to criminal as well as civil proceedings, and that apparently substituted for or supplemented, and was equivalent to, common law coram nobis. In effect, from 1961 on common law coram nobis was deemed to be embodied in Rule 60(c), Ariz. R. Civ. Proc. As a result of the 1973 adoption of Rule 24.2, Ariz. R. Crim. Proc., "Rule 60(c) does not have any further application to criminal cases." Comment on Rule 24.2, Ariz. R. Crim. Proc., in Ariz. Rev. Stat. Ann., vol. 17, p. 165 (1998).)

Since its adoption, Rule 32 has superseded coram nobis in Arizona; coram nobis is no longer available in Arizona. See Rule 32.2, Ariz. Crim. Proc. (Rule 32 displaces all posttrial remedies except posttrial motions, appeal, and habeas corpus). See also Comment on Rule 32.1, Ariz. R. Crim. Proc., (it is intended that Rule 32 encompass all the grounds presently available in Arizona under a writ of coram nobis).

§ 5:60 Postconviction DNA testing statute under Arizona Statutes § 13-4240

In 2000 the Arizona legislature enacted a postconviction DNA testing statute, codified at Ariz. Rev. Stat. Ann. § 13-4240.

§ 5:61 Postconviction DNA testing statute under Arizona Statutes § 13-4240—Text

As codified, the Arizona postconviction DNA testing statute provides:

§ 13-4240. Postconviction deoxyribonucleic acid testing

A. At any time, a person who was convicted of and sentenced for a felony offense and who meets the requirements of this section may request the forensic deoxyribonucleic acid testing of any evidence that is in the possession or control of the court or the state, that is related to the investigation or prosecution that resulted in the judgment of conviction, and that may contain biological evidence.

B. After notice to the prosecutor and an opportunity to respond, the court shall order deoxyribonucleic acid testing if the court finds that all of the following apply:

1. A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through deoxyribonucleic acid testing.

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

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

C. After notice to the prosecutor and an opportunity to respond, the court may order deoxyribonucleic acid testing if the court finds that all of the following apply:

1. A reasonable probability exists that either:

(a) The petitioner's verdict or sentence would have been more favorable if the results of deoxyribonucleic acid testing had been available at the trial leading to the judgment of conviction.

(b) Deoxyribonucleic acid testing will produce exculpatory evidence.

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

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

D. If the court orders testing pursuant to subsection B, the court shall order the method and responsibility for payment, if necessary. If the court orders testing pursuant to subsection C, the court may require the petitioner to pay the costs of testing.

E. The court may appoint counsel for an indigent petitioner at any time during any proceedings under this section.

F. If the court orders testing pursuant to this section, the court shall select a laboratory that meets the standards of the deoxyribonucleic acid advisory board to conduct the testing.

subjected evidence to deoxyribonucleic acid testing, the court may order the prosecutor or defense counsel to provide all the parties and the court with access to the laboratory reports that were prepared in connection with the testing, including underlying data and laboratory notes. If the court orders deoxyribonucleic acid testing pursuant to this section, the court shall order the production of any laboratory reports that are prepared in connection with the testing and may order the production of any underlying data and laboratory notes.

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

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

1. The type of deoxyribonucleic acid analysis to be used.

2. The procedures to be followed during the testing.

3. The preservation of some of the sample for replicating the testing.

4. Elimination samples from third parties.

J. If the results of the postconviction deoxyribonucleic acid testing are not favorable to the petitioner, the court shall dismiss the petition. 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.

K. Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of the postconviction deoxyribonucleic acid testing are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to this article or the Arizona Rules of Criminal Procedure.

§ 5:62 Erroneous Convictions Act

Arizona does not have an erroneous convictions act.