

State of Arizona
Senate
Fifty-first Legislature
First Regular Session
2013

SENATE BILL 1413

AN ACT

AMENDING SECTIONS 13-4033, 13-4041, 13-4231, 13-4232, 13-4233, 13-4234 AND 13-4239, ARIZONA REVISED STATUTES; CHANGING THE DESIGNATION OF TITLE 13, CHAPTER 38, ARTICLE 29, ARIZONA REVISED STATUTES, TO "POSTCONVICTION RELIEF"; RELATING TO POSTCONVICTION RELIEF.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 13-4033, Arizona Revised Statutes, is amended to
3 read:

4 13-4033. Appeal by defendant; appointment of counsel in capital
5 cases; time limits

6 A. An appeal may be taken by the defendant only from:

7 1. A final judgment of conviction or verdict of guilty except insane.

8 2. An order denying a motion for a new trial.

9 3. An order made after judgment affecting the substantial rights of
10 the party.

11 4. A sentence on the grounds that it is illegal or excessive.

12 B. In noncapital cases a defendant may not appeal from a judgment or
13 sentence that is entered pursuant to a plea agreement or an admission to a
14 probation violation.

15 C. IN CAPITAL CASES A DEFENDANT'S DIRECT APPEAL IS TO THE ARIZONA
16 SUPREME COURT. FOLLOWING A NOTICE OF APPEAL THAT IS FILED PURSUANT TO RULE
17 31.2, ARIZONA RULES OF CRIMINAL PROCEDURE, THE TRIAL COURT SHALL IMMEDIATELY
18 APPOINT QUALIFIED APPELLATE COUNSEL. A DEFENDANT'S OPENING BRIEF IS DUE
19 WITHIN SIXTY DAYS AFTER THE FILING OF THE DEFENDANT'S PETITION FOR REVIEW
20 FROM THE TRIAL COURT'S DENIAL OF RELIEF IN THE FIRST POSTCONVICTION RELIEF
21 PROCEEDING.

22 ~~G.~~ D. A defendant may not appeal under subsection A, paragraph 1 or 2
23 OF THIS SECTION if the defendant's absence prevents sentencing from occurring
24 within ninety days after conviction and the defendant fails to prove by clear
25 and convincing evidence at the time of sentencing that the absence was
26 involuntary.

27 Sec. 2. Section 13-4041, Arizona Revised Statutes, is amended to read:

28 13-4041. Fee of counsel assigned in criminal proceeding or
29 insanity hearing on appeal or in postconviction
30 relief proceedings; reimbursement

31 A. Except pursuant to subsection G of this section, if counsel is
32 appointed by the court to represent the defendant in either a criminal
33 proceeding or insanity hearing on appeal, the county in which the court from
34 which the appeal is taken presides shall pay counsel, except that in those
35 appeals where the defendant is represented by a public defender or other
36 publicly funded office, compensation shall not be set or paid. Compensation
37 for services rendered on appeal shall be in an amount as the supreme court in
38 its discretion deems reasonable, considering the services performed.

39 B. After the ~~supreme court has affirmed a defendant's conviction and~~
40 ~~sentence~~ FILING OF A NOTICE OF APPEAL in a capital case, the supreme court
41 or, if authorized by the supreme court, the presiding judge of the county
42 from which the case originated shall appoint counsel to represent the capital
43 defendant in the state postconviction relief proceeding.

1 C. The supreme court OR, IF AUTHORIZED BY THE SUPREME COURT, THE
2 PRESIDING JUDGE OF THE COUNTY FROM WHICH THE CASE ORIGINATED shall establish
3 and maintain a list of persons who are qualified to represent capital
4 defendants in postconviction proceedings. The supreme court may establish by
5 rule more stringent standards of competency for the appointment of
6 postconviction counsel in capital cases than are provided by this subsection.
7 The supreme court may refuse to ~~certify~~ ADD an attorney ~~on~~ TO the list who
8 meets the qualifications established under this subsection or may remove an
9 attorney from the list who meets the qualifications established under this
10 subsection if the supreme court determines that the attorney is incapable or
11 unable to adequately represent a capital defendant. The SUPREME court OR, IF
12 AUTHORIZED BY THE SUPREME COURT, THE PRESIDING JUDGE OF THE COUNTY FROM WHICH
13 THE CASE ORIGINATED shall appoint counsel from the list. Counsel who are
14 appointed from the list shall meet the following qualifications:

15 1. Be a member in good standing of the state bar of Arizona for at
16 least five years immediately preceding the appointment.

17 2. Have practiced in the area of state criminal appeals or
18 postconviction proceedings for at least three years immediately preceding the
19 appointment.

20 3. Not previously have represented the capital defendant in the case
21 either in the trial court or in the direct appeal, unless the defendant and
22 counsel expressly request continued representation and waive all potential
23 issues that are foreclosed by continued representation.

24 D. Before filing a petition, the capital defendant may personally
25 appear before the trial court and waive counsel. If the trial court finds
26 that the waiver is knowing and voluntary, appointed counsel may withdraw.
27 The time limits in which to file a petition shall not be extended due solely
28 to the change from appointed counsel to self-representation.

29 E. If at any time the trial court determines that the capital
30 defendant is not indigent, appointed counsel shall no longer be compensated
31 by public monies and may withdraw.

32 F. Unless counsel is employed by a publicly funded office, counsel
33 appointed to represent a capital defendant in state postconviction relief
34 proceedings shall be paid an hourly rate of not to exceed one hundred
35 TWENTY-FIVE dollars per hour for up to two hundred hours of work, whether or
36 not a petition is filed. Monies shall not be paid to court appointed counsel
37 unless either:

38 1. A petition is timely filed.

39 2. If a petition is not filed, a notice is timely filed stating that
40 counsel has reviewed the record and found no meritorious claim.

41 G. On a showing of good cause, the trial court shall compensate
42 appointed counsel from county funds in addition to the amount of compensation
43 prescribed by subsection F of this section by paying an hourly rate in an
44 amount that does not exceed one hundred TWENTY-FIVE dollars per hour. The
45 attorney may establish good cause for additional fees by demonstrating that

1 the attorney spent over two hundred hours representing the defendant in the
2 proceedings. The court shall review and approve additional reasonable fees
3 and costs. If the attorney believes that the court has set an unreasonably
4 low hourly rate or if the court finds that the hours the attorney spent over
5 the two hundred hour threshold are unreasonable, the attorney may file a
6 special action with the Arizona supreme court. If counsel is appointed in
7 successive postconviction relief proceedings, compensation shall be paid
8 pursuant to section 13-4013, subsection A.

9 H. The county shall request reimbursement for fees it incurs pursuant
10 to subsections F, G and I of this section arising out of the appointment of
11 counsel to represent an indigent capital defendant in a state postconviction
12 relief proceeding. The state shall pay fifty per cent of the fees incurred
13 by the county out of monies appropriated to the supreme court for these
14 purposes. The supreme court shall approve county requests for reimbursement
15 after certification that the amount requested is owed.

16 I. The trial court may authorize additional monies to pay for
17 investigative and expert services that are reasonably necessary to adequately
18 litigate those claims that are not precluded by section 13-4232.

19 Sec. 3. Section 13-4231, Arizona Revised Statutes, is amended to read:
20 13-4231. Scope of postconviction relief

21 Subject to the limitations of section 13-4232, any person who has been
22 convicted of or sentenced for a criminal offense ~~may~~, without payment of any
23 fee, MAY institute a proceeding to secure appropriate relief on any of the
24 following grounds:

25 1. The conviction or the sentence was in violation of the Constitution
26 of the United States or of this state.

27 2. The court was without jurisdiction to render judgment or to impose
28 sentence.

29 3. The sentence imposed exceeded the maximum authorized by law or is
30 otherwise not in accordance with the sentence authorized by law.

31 4. The person is being held in custody after his sentence has expired.

32 5. Newly discovered material facts probably exist and ~~that~~ the facts
33 probably would have changed the verdict or sentence. Newly discovered
34 material facts exist if:

35 (a) The newly discovered material facts were discovered after the
36 trial.

37 (b) The defendant exercised due diligence in securing the newly
38 discovered material facts.

39 (c) The newly discovered material facts are not merely cumulative or
40 used solely for impeachment, unless the impeachment evidence substantially
41 undermines testimony ~~which~~ THAT was of critical significance at trial such
42 that the evidence probably would have changed the verdict or sentence.

43 6. The defendant's failure to appeal from the judgment or sentence, or
44 both, within the prescribed time was without fault on his part.

1 7. There has been a significant change in the law that if determined
2 to apply to the defendant's case would probably overturn the defendant's
3 conviction or sentence.

4 8. THE DEFENDANT DEMONSTRATES BY CLEAR AND CONVINCING EVIDENCE THAT
5 THE FACTS UNDERLYING THE CLAIM WOULD BE SUFFICIENT TO ESTABLISH THAT A
6 REASONABLE FACT FINDER WOULD NOT HAVE FOUND THE DEFENDANT GUILTY OF THE
7 UNDERLYING OFFENSES BEYOND A REASONABLE DOUBT, OR IN A CAPITAL CASE A
8 REASONABLE FACT FINDER WOULD NOT HAVE FOUND THE DEFENDANT GUILTY OF AT LEAST
9 ONE AGGRAVATING CIRCUMSTANCE THAT MADE THE DEFENDANT ELIGIBLE FOR A DEATH
10 SENTENCE.

11 Sec. 4. Section 13-4232, Arizona Revised Statutes, is amended to read:
12 13-4232. Preclusion of postconviction relief; exceptions

13 A. A defendant is precluded from relief under this article based on
14 any ground:

15 1. Still raisable on direct appeal or on a post-trial motion BASED ON
16 THE EXISTING RECORD AT THE TIME THE POSTCONVICTION PETITION IS FILED.

17 2. Finally adjudicated on the merits on appeal or in any previous
18 collateral proceeding.

19 3. That was waived at trial, on appeal or in any previous collateral
20 proceeding.

21 B. This section does not apply to claims for relief pursuant to
22 section 13-4231, paragraph 4, 5, 6 or 7. If a claim under section 13-4231,
23 paragraph 4, 5, 6 or 7 is to be raised in a successive or untimely petition,
24 the notice shall set forth the substance of the claim and the reasons for not
25 raising the claim in the previous petition or in a timely manner. If the
26 notice does not state meritorious reasons substantiating the claim and why
27 the claim was not stated in the previous petition or in a timely manner, the
28 proceeding shall be summarily dismissed.

29 C. ~~Except for summary dismissals pursuant to subsection B of this~~
30 ~~section, the state shall plead and prove any ground of preclusion by a~~
31 ~~preponderance of the evidence. Though the state has the burden to plead and~~
32 ~~prove grounds of preclusion,~~ Any court on review of the record may determine
33 and hold that an issue is precluded regardless of the state's failure to
34 raise the preclusion issue.

35 Sec. 5. Section 13-4233, Arizona Revised Statutes, is amended to read:
36 13-4233. Nature of proceeding and relation to other remedies

37 A proceeding pursuant to this article is a part of the original
38 criminal action and not a separate action. It displaces and incorporates all
39 trial court post-trial remedies except post-trial motions. ~~and habeas~~
40 ~~corpus. If a defendant applies for a writ of habeas corpus in a court having~~
41 ~~jurisdiction of his person attacking the validity of his conviction or~~
42 ~~sentence, that court pursuant to this article shall transfer the cause to the~~
43 ~~court where the defendant was convicted or sentenced and that court shall~~
44 ~~treat it as a petition for relief under this article and the procedures of~~
45 ~~this article apply.~~

1 Sec. 6. Section 13-4234, Arizona Revised Statutes, is amended to read:
2 13-4234. Commencement of proceedings; notice; appointment of
3 counsel for capital defendants; assignment of judge;
4 stay

5 A. A proceeding is commenced by timely filing a notice of
6 postconviction relief with the clerk of the court in which the conviction
7 occurred. The clerk of the trial court shall provide notice forms for
8 commencement of first and successive postconviction relief proceedings. The
9 notice shall bear the caption of the original criminal action to which it
10 pertains. The notice in successive postconviction relief proceedings shall
11 comply with section 13-4232, subsection B. On receipt of the notice, the
12 clerk of the trial court shall file a copy of the notice in the case file of
13 each original action and promptly send copies to the defendant, the
14 defendant's attorney, if known, the county attorney and the attorney general,
15 noting the date and manner of sending the copies in the record. The state
16 shall notify the victim on request.

17 B. If an appeal of the defendant's conviction or sentence, or both, is
18 pending, the clerk, within five days after the filing of the notice for
19 postconviction relief, shall send a copy of the notice to the appropriate
20 appellate court, noting the date and manner of sending the copy in the
21 record.

22 C. In noncapital cases, the notice shall be filed within ninety days
23 after the judgment and sentence are entered or within thirty days after the
24 order and mandate affirming the judgment and sentence is issued on direct
25 appeal, whichever is later. A defendant has sixty days from the filing of
26 the notice in which to file a petition. On the filing of a successive
27 notice, a defendant has thirty days from the filing of the notice in which to
28 file a petition.

29 D. In capital cases, on the ~~issuance of a mandate affirming the~~
30 ~~defendant's conviction and sentence on direct appeal~~ FILING OF THE NOTICE OF
31 APPEAL, the clerk of the supreme court expeditiously shall file a notice of
32 postconviction relief with the trial court. On the first notice in capital
33 cases, a defendant has ~~sixty~~ ONE HUNDRED TWENTY days from the filing of the
34 notice OF THE COMPLETION OF THE DIRECT APPEAL RECORD in which to file a
35 petition. ~~The supreme court shall appoint~~ COUNSEL SHALL BE APPOINTED
36 pursuant to section 13-4041, subsection B. All indigent state prisoners
37 under a capital sentence are entitled to the appointment of counsel to
38 represent them in state postconviction proceedings. A competent indigent
39 defendant may reject the offer of counsel with an understanding of its legal
40 consequence. On successive notice in capital cases, the trial court shall
41 appoint the previous postconviction relief counsel of the capital defendant
42 unless counsel is waived pursuant to section 13-4041, subsection D or good
43 cause exists to appoint another qualified attorney pursuant to section
44 13-4041, subsection B. On the filing of a successive notice, a capital

1 defendant or an appointed attorney has ~~thirty~~ SIXTY days from the filing of
2 the notice in which to file a petition.

3 E. A defendant who has pled guilty and who is precluded from filing a
4 direct appeal pursuant to section 13-4033 may be granted an additional thirty
5 day extension of time in which to file the petition if the defendant's
6 counsel refuses to raise issues and leaves the defendant insufficient time to
7 file a petition within the time limits.

8 F. On a specific and detailed showing of good cause, a defendant in a
9 noncapital case may be granted up to a sixty day extension of time in which
10 to file the petition. On a specific and detailed showing of good cause, a
11 defendant in a capital case may be granted one thirty day extension of time
12 in which to file the petition.

13 G. The time limits are jurisdictional, and an untimely filed notice or
14 petition shall be dismissed with prejudice.

15 H. If the record of the trial proceeding has not been transcribed, the
16 defendant may request on a form provided by the clerk of the superior court
17 that the record be prepared. The court shall order that those portions of
18 the record be prepared that it deems necessary to resolve the issues to be
19 raised in the petition. The preparation of the record is a county expense if
20 the defendant is indigent. The time for filing the petition is tolled from
21 the time a request for the record is made until the record is prepared or the
22 request is denied.

23 I. The proceeding shall be assigned to the sentencing judge if it is
24 possible. If it appears that the sentencing judge's testimony is relevant,
25 the sentencing judge shall transfer the case to another judge.

26 J. If the defendant has received a sentence of death and the supreme
27 court has fixed the time for execution of the sentence, a stay of execution
28 shall not be granted on the filing of a second or subsequent petition except
29 on separate application for a stay to the supreme court setting forth with
30 particularity those issues raised ~~which~~ THAT are not precluded under section
31 13-4232. The warrant shall not be stayed to allow for the filing of a
32 petition.

33 Sec. 7. Section 13-4239, Arizona Revised Statutes, is amended to read:
34 13-4239. Review

35 A. Any party aggrieved by a final decision of the trial court in these
36 proceedings ~~may~~, within fifteen days after the ruling of the court, ~~MAY~~ move
37 the court for a rehearing setting forth in detail the grounds for believing
38 that the court erred. A response shall be filed within fifteen days after
39 service of the motion on the adverse party. A reply, if any, shall be filed
40 within ten days after service of the response. The filing of a motion for
41 rehearing in the trial court is not a prerequisite to the filing of a
42 petition for review pursuant to subsection C ~~OF THIS SECTION~~.

43 B. If the motion for rehearing is granted, the court may either amend
44 its previous ruling without a hearing or grant a new hearing and then either
45 amend or reaffirm its previous ruling. If the court amends its previous

1 ruling, the court shall set forth its reasons for amending the previous
2 ruling. The state shall notify the victim on request of any action that is
3 taken by the court.

4 C. Within thirty days after the final decision of the trial court on
5 the petition for ~~post-conviction~~ POSTCONVICTION relief or motion for
6 rehearing, an aggrieved party may petition the appellate court for review of
7 the trial court's actions. A cross-petition for review may be filed with the
8 clerk of the trial court within fifteen days after service of a petition for
9 review. The petition or cross-petition shall be filed with the clerk of the
10 trial court and shall set forth in detail the grounds for believing that the
11 court erred. The filing of a motion for rehearing pursuant to subsection A
12 OF THIS SECTION does not limit the issues that may be raised in the petition
13 or cross-petition for review. The failure to raise an issue that could be
14 raised in the petition or cross-petition for review constitutes a waiver of
15 appellate review of that issue. A response shall be filed within fifteen
16 days and a reply shall be filed within ten days.

17 D. The form, contents and service for a ~~post-conviction~~ POSTCONVICTION
18 relief petition and cross-petition shall be as prescribed by rule 32.9 of the
19 rules of criminal procedure.

20 E. A motion for rehearing or a petition for review that is filed
21 pursuant to this section shall stay an order of the trial court issued in the
22 ~~post-conviction~~ POSTCONVICTION relief proceedings until final review is
23 completed unless the trial court specifically orders otherwise. The state
24 shall notify the victim on request of any action taken.

25 F. Within thirty days after the expiration of the time for filing the
26 last reply, the record, including the trial court file, the reporter's
27 transcript, the original and all copies of the petition and cross-petition
28 for review, responses and replies shall be transmitted to the appellate
29 court. IN A CAPITAL CASE, DIRECT APPEAL COUNSEL SHALL INCLUDE IN THE OPENING
30 BRIEF ON DIRECT APPEAL ALL COLORABLE CLAIMS OF INEFFECTIVE ASSISTANCE OF
31 TRIAL AND SENTENCING COUNSEL, REGARDLESS OF WHETHER THE CLAIMS HAVE BEEN
32 RAISED IN A PETITION FOR REVIEW FROM THE DENIAL OF POSTCONVICTION RELIEF.
33 THE SUPREME COURT SHALL ADDRESS THE INEFFECTIVE ASSISTANCE OF TRIAL AND
34 SENTENCING COUNSEL CLAIMS ON DIRECT APPEAL.

35 G. The appellate court may grant review and may order oral argument on
36 the petition if deemed necessary and may issue ~~such~~ orders and grant ~~such~~
37 relief as it deems necessary and proper. The state shall notify the victim
38 on request of any action taken by the appellate court.

39 H. The provisions that govern the filing of motions for
40 reconsideration and petitions for review in criminal appeals that are set
41 forth in rules 31.18 and 31.19, Arizona rules of criminal procedure, apply to
42 and govern motions for reconsideration and petitions for review pursuant to
43 rule 32, Arizona rules of criminal procedure.

1 I. When the matter is determined the clerk of the appellate court
2 shall return the record to the appropriate clerk of the court for retention
3 according to law.

4 Sec. 8. Heading change

5 The article heading of title 13, chapter 38, article 29, Arizona
6 Revised Statutes, is changed from "POST-CONVICTION RELIEF" to "POSTCONVICTION
7 RELIEF".

8 Sec. 9. Effective date

9 This act is effective from and after December 31, 2013.