

From: Tracey Westerhausen

Re: Arizona criminal appeal and PCR process

Date: April 17, 2007

--

This memo explains the Arizona direct appeal process and another one, called the petition for post-conviction relief (PCR). Also, I'll talk about release on appeal in Arizona. Finally, I'll talk about the clemency process (clemency is Arizona's version of parole). .

Our office handles state and federal trial work and we have frequently been hired after trial to assist with sentencing. We also have extensive experience in the Arizona criminal appeal and post-conviction release process, as well as in the federal appeal process.

Direct Appeal in Arizona State Courts

- 1. Who can file a direct appeal in state court?** In general, only a defendant who has gone to trial and been convicted there; the state can cross-appeal on some issues.
- 2. How to file:** a notice of appeal must be filed within 20 days of sentencing, and, if need be, within 20 days of a final restitution order.
- 3. What is an appeal?** The defendant's case will next go to the Arizona State Court of Appeals. There, a three judge panel will review the transcripts of the trial, any exhibits sent to the appellate court, and the briefs filed by the parties. The judges will not call any witnesses, or hear any live testimony. Their decision will be based purely on legal grounds, such as, did the judge correctly apply the law to the facts?
- 4. What are briefs?** Briefs are booklets that detail the facts, the law applicable to the facts, and why the result of the defendant's case should or should not stand. There is an opening brief (by the defense), a response brief (by an assistant attorney general), and an optional reply brief (by the defense). The court sets limits on how long the briefs can be.
- 5. When is the record on appeal completed?** After the clerk of the superior court sends all the motion papers and certain types of exhibits, and after the court reporters get all the needed transcripts filed with the clerk of the Court of Appeals, the record is deemed complete. This can take a long time, because the court reporters are really behind, and usually there is more than one reporter to track down for all the needed transcripts.
- 6. What issues do you raise in a brief?** The Court of Appeals only cares about important issues that were wrongly decided, or that involve a new area of law. So, we must be selective in making our presentation. Some issues that were raised at trial might be sure losers on appeal, and so I don't raise them, in order to bolster the credibility of other issues. Other issues might have merit, but make no difference in the case (this is called "harmless error"). We often don't raise those issues, either. And, the appeal issues are generally limited to those that the defense attorney brought to the attention of the trial court (this is why lawyers are always objecting). If there was a basic, glaring mistake that occurred that the defense lawyer did not catch, this can sometimes be brought up as "fundamental error."

7. What happens after the briefs have been filed? The defendant waits. The Court of Appeals has the option of setting the case for consideration with or without oral argument. (The defendant doesn't get to be present at any oral argument, if still in custody, unfortunately.) It sets a date about 4 - 6 months after the briefs are filed to consider the case. Once the case has been considered, the defense waits some more for a decision. This can be a wait of a few months, or it can exceed a year.

8. What can the Court of Appeals do? It can affirm a conviction and sentence, it can set aside all of a judgment and order a new trial, or set aside a judgment and order the defendant released. It can order a re-trial or re-hearing on parts of the case. These are the basic things that can be done.

9. What happens after the decision of the Court of Appeals? One side or the other — sometimes both — will ask the Arizona Supreme Court to review the case. It is extremely selective about the cases it will hear. Very few are ever accepted, although many are filed. I might not raise all the issues that I submitted to the Court of Appeals in a petition for review to the Arizona Supreme Court.

10. What is the process before the Arizona Supreme Court? After the petition for review is filed, the Court will issue an order accepting or denying review. This can take from 3 - 9 months or more. And if a petition is accepted for review, the Court may consider the case with or without oral argument. Once the case has been considered, it may be 2 - 12 months or more before a decision is rendered.

11. How do we know when the direct appeal process is at an end? If no one wants to challenge the result at the Court of Appeals, then that court will issue a "mandate." Or, once the case is finished at the Arizona Supreme Court, it will tell the Court of Appeals to issue the mandate. The mandate is the signal that the direct appeal process is over.

12. What about the United States Supreme Court? Very few cases have issues that are suitable for this Court, but if a defendant has one, they should talk with a lawyer as quickly as possible after the mandate has issued, if not before.

13. What about going to federal court with a petition for habeas corpus? Once a defendant has exhausted (completed) the state court direct appeal and PCR proceedings (discussed below), there might be a case for

federal habeas corpus review. A defendant in this position will want to speak with an attorney who specializes in this area, well before the state court proceedings are over. This office does not specialize in federal habeas corpus work.

Petition for Post-Conviction Relief in the Arizona State Courts

1. What is the difference between a direct appeal and a petition for post-conviction relief? Remember that a direct appeal was limited to issues raised to the trial court? And, that the direct appeal went to a panel of appellate judges? Those are two key differences between an appeal and a PCR. In a PCR, we are looking for issues that were not litigated in the first go-around. When we have those, we take them right back to the trial judge who handled the trial.

2. What kinds of issues do you raise in a PCR? There are three issues that regularly appear in PCRs, although there are many grounds available. One is newly discovered evidence. For example, sometimes a witness really does come forward after a trial, with testimony that would have made a difference. Another common issue is a change in the law. Once in a while the courts change their minds about a legal issue, and sometimes defendants who were subjected to the old rule can ask for relief. A very common issue is that of ineffective assistance of counsel. This means that the defense lawyer made a mistake that affected, or probably affected, the outcome of the trial.

3. What are the two most important things to remember about a PCR? First, there is a great, almost impenetrable reluctance on the part of the trial courts to set aside a conviction or sentence. Second, the rule that always operates in these cases is “no harm, no foul.” If a mistake were made, but the result would have been the same, then the trial court will not grant any relief.

4. When does the PCR process start? It *may* start anytime after conviction. So, it may even begin while a direct appeal is still pending. A PCR *must* start, as a general rule, within 30 days after the mandate issues.

5. How does the PCR process start? It begins by the filing of a notice of post-conviction relief, which is a simple, one or two page document. Depending on the case, I might ask for an extension of time to file the notice of PCR. Once it is filed, I might ask for an extension of time to file the petition

itself. Sometimes, different and additional investigation needs to be done, and the time limits for the PCR process — as written — are pretty short.

6. Does the PCR have to go back to the original judge? Yes, unless there is some basis that has developed for accusing the judge of bias, so that they should not hear the case. Also, the judge has the option of transferring the case to another judge.

7. What happens after the petition is filed? The trial court may reject the claims in the petition with or without a hearing. If there is a hearing, then there might be additional evidence presented, without a jury. Once the trial court makes a decision, then the procedure is pretty much like the one for a direct appeal: asking the Court of Appeals to review the case, and then, if necessary, the Arizona Supreme Court.

8. What can the trial judge do in a PCR? There are the same options as in an appeal: a new trial, a partial re-hearing and decision on some issues, or, affirming the conviction.

Release Pending Appeal

The bottom line is that in an Arizona state (not federal) case, there is no right to release pending appeal, unless a defendant's continued imprisonment is such a grave threat to their health that they will die because of it. This is a very tough standard to meet.

Clemency

There are two tracks for clemency, the fast track and the regular one. The fast track starts at sentencing. If the defense attorney asks the judge to make a finding that the defendant should be allowed to apply for early clemency, and if the judge agrees or makes the finding on their own, then the defendant can apply for clemency within 90 days of sentencing.

The regular track has a general rule that a defendant must have served two years of the sentence before applying for clemency.

In either case, the application is made to the Board of Executive Clemency. The information submitted to the board is much like the defense presentation at sentencing, to explain the defendant's character and what led up to the offense, for example. The board will want to know why the

sentence was too harsh, and what assurances there are that, if released, the defendant will remain law-abiding.

The board will hold a hearing, where supporters, but not the defendant, are welcome to attend and speak. That is phase one.

If the board approves of the petition for clemency, it will set a phase two hearing. This is the opportunity for the defendant to be present, to answer board members' questions, and to speak on their own behalf. It is held at a DOC facility. Here, too, supporters are welcome to attend and speak.

If the board agrees that the defendant has passed phase two, then the application goes to the governor, with the board's recommendation. The board might, for instance, suggest that the defendant's sentence be reduced to time served, or cut substantially.

Conclusion.

This memo addresses some of the frequently-asked-questions about state post-conviction procedure. A

defendant should have their individual case reviewed by an attorney to see whether the information in this memo is

applicable to them.