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REPRESENTING PRISON INMATES: A PRIMER ON AN EMERGING DIMENSION OF POVERTY LAW PRACTICE

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Until quite recently, it was common practice for an indigent prison inmate in need of legal assistance to fend for himself[1] or perhaps to secretively[2] seek the services of a jailhouse lawyer. Fortunately, the legal profession is now recognizing the need for legal services among indigent prisoners,[3] and the Virginia[4] and Arkansas penal exposés can be expected to heighten this concern and accelerate the involvement of the profession in this area. Similarly, prison administrators should show increasing interest in expanded legal assistance programs, at least if they hope to retain existing restrictions on the performance of legal work by prisoner-practitioners, since the recent ruling in *Johnson v. Avery*[5] holds in effect that states must either devise schemes for providing legal assistance to inmates or else permit some practice by jailhouse lawyers.

One manifestation of this contemporary concern over the lack of legal services available to inmates has been the emergence of various groups

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1 *See Prison Writ-Writing: Three Essays*, 56 CALIF. L. REV. 342 (1968).

2 Most prisons have regulations against inter-inmate legal assistance. *E.g.*, ARIZONA STATE PRISON, RULES & REGULATIONS GOVERNING INMATES 40. See Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343. The constitutionality of such regulations, in the absence of an alternative state scheme for providing legal assistance to inmates, was called into question by Johnson v. Avery, 393 U.S. 483 (1969).

3 The most comprehensive discussion to date of legal services programs for prisoners is Note, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514.

4 Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

5 393 U.S. 483 (1969). To its credit, the Federal Bureau of Prisons, without the impetus of *Johnson*, has long recognized the need for legal assistance programs, and in fact has pioneered their development in federal institutions. *See* Barkin, *Impact of Changing Law Upon Prison Policy*, 48 PRISON J. 3, 8 (1968) (Mr. Barkin is legal counsel to the Bureau of Prisons).

willing to perform the needed tasks. Several prisoner legal assistance programs staffed by public defenders, bar association volunteers, and law students have been formed,[6] and with the increasing emphasis on clinical work in legal education, law school-based programs—such as the Post-Conviction Legal Assistance Clinic at the University of Arizona[7]—can be expected to mushroom.

To function effectively, participants in prisoner legal assistance programs must, of course, be familiar with the requirements and limitations of the post-conviction remedies available within the jurisdiction. To that end, each permanent program should consider seriously the idea of publishing a rather detailed analysis of these remedies and of some of the legal problems likely to arise in the representation of prison inmates.[8] The present article is accordingly devoted to an examination and viability analysis of the basic avenues of relief under local law. Hopefully, though its emphasis is almost entirely on Arizona law, it may be able to function as a guide in other jurisdictions to prisoner legal assistance groups interested in undertaking a similar task.

[6] Johnson v. Avery, 393 U.S. 483, 489 (1969). Several programs are discussed in the literature. In addition to articles previously cited, see Aschenbrenner, *The Appellate Defender in Oregon*, 23 LEGAL AID BRIEF CASE 209 (1965); Hubanks & Linde, *Legal Services to the Indigent Imprisoned*, 23 LEGAL AID BRIEF CASE 214 (1965); Moran, *Legal Services for the Poor—The Post-Conviction Program*, 49 MASS. L.Q. 327 (1964); Temin, *Services to the County Prison Report on Post-Conviction*, 25 LEGAL AID BRIEF CASE 18 (1966); Wilson, *Legal Assistance Program at Leavenworth*, 24 LEGAL AID BRIEF CASE 254 (1966); Note, *Client Service in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448, 465-67 (1969). *See also* NATIONAL COUNCIL ON CRIME AND DELINQUENCY, DIRECTORY OF LAW STUDENT IN CORRECTION PROGRAMS (recent publication describing law school programs of legal assistance in a correctional context).

[7] The Post-Conviction Legal Assistance Clinic, designed to assist indigent inmates at the Arizona State Prison, is supervised by the faculty and volunteer attorneys, and is staffed by law students enrolled in the Criminal Procedure Seminar.

[8] While the present study is limited to an analysis of post-conviction remedies, persons considering undertaking parallel studies in other jurisdictions may wish to expand the coverage to include such matters as detainers, computation of sentence (and good-time allowance), parole eligibility and revocation, and rights of prisoners.

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HABEAS CORPUS

SCOPE OF THE REMEDY

Local constitutional and statutory provisions[9] guarantee to persons incarcerated in the Arizona State Prison the right to petition the proper state court[10] for a writ of habeas corpus to inquire into the cause of their imprisonment.[11] Habeas corpus is in Arizona, as elsewhere, by far the

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9 ARIZ. CONST. art. 2, § 14; ARIZ. REV. STAT. ANN. § 13-2001 (1956).

10 The important remedy of *federal* habeas corpus for state prisoners — an avenue that is usually available only after state remedies have been exhausted — is not discussed in this article. An excellent how-to-do-it on the federal remedy, complete with forms, is R. SOKOL, FEDERAL HABEAS CORPUS (2d ed. 1969) [hereinafter cited as SOKOL]. Sokol's drafting hints and his discussion of the habeas corpus litigation process can also be extremely valuable in state court practice, and his work should be considered an everyday reference for the post-conviction practitioner. A far more theoretical but highly useful work is Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L. REV. 78 (1964).

11 Not yet expressly overruled in Arizona is Goodman v. State, 96 Ariz. 139, 393 P.2d 148 (1964), holding, on the authority of McNally v. Hill, 293 U.S. 131 (1934), that habeas corpus is available only to attack *present* sentences. But in light of *McNally's* overruling by Peyton v. Rowe, 391 U.S. 54 (1968), it is likely

most common post-conviction remedy.[12] Yet, for all the judicial time and effort expended in habeas litigation, Arizona law is not yet clear regarding even such fundamentals as the types of claims cognizable under the writ.[13]

Cognizable Constitutional Claims

The confusion surrounding the scope of the remedy is attributable to the partial survival of the traditional rule that the writ can inquire only into the jurisdiction of the convicting court. Efforts to bring modern due process claims within this rule have resulted in a certain amount of doctrinal tension and uncertainty. As a result, Arizona appellate courts confronting habeas petitions have typically reacted in one of three discernible ways. They have:

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that when next confronted with the question, Arizona courts will expressly abolish the antiquated prematurity doctrine and permit a habeas court to inquire into the legality of a future sentence.

[12] The writ of error coram nobis, a remedy designed to rectify serious errors of fact not appearing on the face of the record, has rarely been used in Arizona, perhaps because the writ was long ago viewed, in a civil context, as obsolete. Billups v. Freeman, 5 Ariz. 268, 52 P. 367 (1898). Yet, it is clear from the recent case of State v. Kruchten, 101 Ariz. 186, 417 P.2d 510 (1966), that coram nobis can properly be used in Arizona in a criminal context.

In *Kruchten,* the defendant, on direct appeal of his conviction, sought to extend the record by submitting to the appellate court affidavits asserting inadequacy on the part of his trial counsel. The Supreme Court of Arizona deemed it improper so to extend the record, but accomplished the same result indirectly through coram nobis, by ordering the case returned to the superior court of the county of conviction to hold a factual hearing and to prepare for the supreme court proposed findings of fact and conclusions of law relating to the effective assistance of counsel claim. *See* State v. Griswold, — Ariz. —, 457 P.2d 331 (1969) (use of coram nobis to order hearing in superior court on voluntariness of plea). *But see* State v. Sheppard, 2 Ariz. App. 242, 407 P.2d 783 (1965) (unlike the supreme court, the court of appeals lacks the power to issue a writ of coram nobis—or, more accurately, a writ of *coram vobis*—to transfer a case to a lower court for fact-finding).

Another probable explanation for the relative disuse in Arizona of coram nobis is that many errors outside the record, correctable in other jurisdictions only by coram nobis, are under modern decisions cognizable in Arizona by other post-conviction remedies, such as habeas corpus and motions under rule 60(c), both discussed *infra.* For example, the following claims — typically matters for coram nobis concern elsewhere — are, in Arizona, appropriate assertions for habeas corpus relief: ineffective assistance of counsel, Barron v. State *ex rel.* Eyman, 7 Ariz. App. 223, 437 P.2d 975 (1968); suppression of exculpatory evidence by the state, Cooper v. State *ex rel.* Eyman, 7 Ariz. App. 272, 438 P.2d 341 (1968); involuntariness of a guilty plea, *In re* Buccheri, 6 Ariz. App. 196, 431 P.2d 91 (1967); invalidity of a prior conviction used as the basis of a recidivist sentence, Smith v. Eyman, 104 Ariz. 296, 451 P.2d 877 (1969). For a comprehensive discussion of coram nobis, see E. FRANK, CORAM NOBIS (1953).

[13] Some fundamentals regarding the writ are, however, quite clear. No filing fee is required and no time restriction on filing exists. *See* note 61 *infra.* It is not available to correct minor errors or irregularities in procedure, nor can it be used by a superior court to review the judgment of a state appellate court. State *ex rel.* Ronan v. Superior Ct., 94 Ariz. 414, 385 P.2d 707 (1963). Since the writ cannot be a substitute for an appeal, inferior tribunals during the pendency of an appeal are without jurisdiction to entertain a habeas petition attacking anything which is raised or could have been raised in the appeal. Eyman v. Cumbo, 99 Ariz. 8, 405 P.2d 889 (1965). As to possible consequences of failing to appeal, *compare* Fay v. Noia, 372 U.S. 391 (1963), *with* Henry v. Mississippi, 379 U.S. 443 (1965). *See also* note 180 *infra.*

a. denied the petition, holding that a writ of habeas corpus in Arizona may review only jurisdictional matters;[14]

b. given lip service to the jurisdictional limitation, but proceeded to consider the merits of the claim;[15]

c. considered solely the merits of the claim, without discussing jurisdictional implications.[16]

Among modern precedents limiting the writ to jurisdictional defects is *State ex rel. Jones v. Superior Court*,[17] an often-cited 1955 decision of the Supreme Court of Arizona. There, in denying relief to a petitioner who had committed a particularly sensational offense, the court dismissed assertions of illegal search and seizure, involuntariness of a guilty plea, violation of the right to confrontation, and cruel and unusual punishment as being without legal merit and "not remotely related to the question of the jurisdiction of the trial court."[18] Accordingly, these assertions were not subject to habeas review. Regrettably, *Jones* does not stand alone. As late as 1964, the court reaffirmed that "[e]ven where there has been a denial of due process of law, it must be such as to deprive a court of jurisdiction in order to permit . . . the issuance of the writ."[19] And in 1966, citing *Jones*, it held non-jurisdictional and hence without the proper purview of a habeas corpus proceeding, a claim that the trial court failed to conduct a confession suppression hearing[20] as required by the United States Supreme Court in *Jackson v. Denno*.[21]

It should be apparent that continued adherence to a jaded jurisdictional framework by positing the ultimate question in terms of defects which deprive the trial court of jurisdiction is a meaningless and unproductive approach for courts, scholars and practitioners alike. From the practitioners' perspective, it seems plainly preferable to look instead to the categories of claims the courts have considered (or indicated they would consider) in the habeas context. In Arizona, the following constitutional questions, which hardly go to jurisdiction in the traditional sense, have been discussed in a habeas corpus setting without the court summarily denying relief:

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14 *E.g.*, Rosthenhausler v. State *ex rel.* Eyman, 8 Ariz. App. 459, 447 P.2d 274 (1968) (absence of counsel at time of plea to joyriding does not void the conviction). *Rosthenhausler* is no longer good law. *See* note 16 *infra*.

15 *E.g., In re* Buccheri, 6 Ariz. App. 196, 431 P.2d 91 (1967) (involuntary guilty plea goes to jurisdiction). *Buccheri* should be compared with State *ex rel.* Jones v. Superior Ct., 78 Ariz. 367, 280 P.2d 691 (1955), where the Supreme Court of Arizona held that a claim relating to the involuntariness of a guilty plea did not affect jurisdiction.

16 *E.g.*, Smith v. Eyman, 104 Ariz. 296, 451 P.2d 877 (1969) (absence of counsel at misdemeanor conviction precludes subsequent use of that conviction under a recidivist statute).

17 78 Ariz. 367, 280 P.2d 691 (1955).

18 *Id.* at 374, 280 P.2d at 696.

19 Oppenheimer v. Boies, 95 Ariz. 292, 297, 389 P.2d 696, 700 (1964); *accord*, Oswald v. Martin, 70 Ariz. 392, 396, 222 P.2d 632, 635 (1950).

20 State v. Court of Appeals, 101 Ariz. 166, 416 P.2d 599 (1966).

21 378 U.S. 368 (1964).

a. tainted identification evidence;[22]

b. voluntariness of a guilty plea;[23]

c. prejudice resulting from the absence of counsel at a preliminary hearing;[24]

d. ineffective assistance of counsel;[25]

e. deprivation of the right to counsel;[26]

f. absence of counsel at sentencing;[27]

g. absence of counsel at time of plea;[28]

h. infirmity (lack of counsel) in a prior conviction, when that conviction is used as the basis for a recidivist sentence;[29]

i. suppression of evidence by the prosecution;[30]

j. the right to confrontation.[31]

Significantly, all 10 decisions listed above were decided in 1966 or thereafter. Thus, despite occasional retrogression, there seems to be a clear trend toward viewing the writ as embracing all errors of a constitutional dimension. Indeed, the Supreme Court of Arizona in the 1967 decision of *State v. Montez*[32] stated, though concededly in dictum, that habeas corpus "may not be used to collaterally attack a judgment of con-

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[22] Denmon v. State *ex rel.* Eyman, 7 Ariz. App. 247, 437 P.2d 999 (1968). The court of appeals in *Denmon* held due process violations of Stovall v. Denno, 388 U.S. 293 (1967), clearly cognizable in state habeas corpus proceedings and strongly suggested that allegations of right to counsel violations of United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), would be similarly entertained.

[23] *In re* Buccheri, 6 Ariz. App. 196, 431 P.2d 91 (1967). Actually, the court denied the petition without prejudice to its being refiled in the superior court. *See also* Grillett v. Eyman, 3 Ariz. App. 142, 412 P.2d 484 (1966).

[24] Yanez v. State, 3 Ariz. App. 109, 412 P.2d 284 (1966). The court, however, found no prejudice.

[25] Barron v. State *ex rel.* Eyman, 7 Ariz. App. 223, 437 P.2d 975 (1968).

[26] Johnson v. State *ex rel.* Eyman, 4 Ariz. App. 336, 420 P.2d 298 (1966); *accord*, Barron v. State *ex rel.* Eyman, 7 Ariz. App. 223, 437 P.2d 975 (1968).

[27] Pina v. State, 100 Ariz. 47, 410 P.2d 658 (1966).

[28] Grillett v. Eyman, 3 Ariz. App. 142, 412 P.2d 484 (1966).

[29] Smith v. Eyman, 104 Ariz. 296, 451 P.2d 877 (1969).

[30] Cooper v. State *ex rel.* Eyman, 7 Ariz. App. 272, 438 P.2d 341 (1968). Suppression of evidence claims under Brady v. Maryland, 373 U.S. 83 (1963), can in Arizona seemingly be raised either by habeas corpus, as in *Cooper*, or by a motion for a new trial on newly discovered evidence. *See* State v. Fowler, 101 Ariz. 561, 422 P.2d 125 (1967), and the discussion in *The Arizona Supreme Court 1967-68*, 10 ARIZ. L. REV. 148, 198-200 (1968). Habeas corpus, however, seems to be the sole remedy for *Brady* violations in those cases where there is only a reasonable possibility that the suppressed evidence could have changed the verdict, or where defense counsel with due diligence could have uncovered the suppressed evidence before trial. In such cases, though *Brady* may have been violated, see Chapman v. California, 386 U.S. 18 (1967) and Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966), a new trial motion under rule 310 will presumably be unavailable; that rule requires that the newly discovered evidence have a substantial probability of changing the verdict and also requires due diligence on the part of defense counsel. See section on new trial motions *infra*.

[31] Olivas v. Eyman, 104 Ariz. 163, 449 P.2d 942 (1969) (co-defendant's confession admitted at joint trial). Note that *Olivas* implicitly overrules at least the confrontation aspect of *Jones*. See text accompanying note 17 *supra* and note 38 *infra*.

[32] 102 Ariz. 444, 432 P.2d 456 (1967).

viction where the claimed errors do not involve a loss of jurisdiction by a court *because of a denial of constitutional rights under either the federal or state constitutions.*"[33]

Arizona's struggle in developing the contours of habeas corpus is anything but unique. It is, in fact, clearly reminiscent of the development of the federal writ.[34] Consider, for instance, the striking parallel between the language used in *Montez* and that used by the United States Supreme Court, speaking in 1939 in *Bowen v. Johnson*:[35] "[I]f it be found that the court had no jurisdiction to try the petitioner, *or that in its proceedings his constitutional rights have been denied,* the remedy of *habeas corpus* is available."[36]

In the federal courts, the conceptual struggle has finally run its course. It is now beyond argument that the writ's scope is set principally by concepts of due process.[37] From an analysis of the total picture, including the recent trend of Arizona decisions, the language of *Montez,* the silent but clear overruling of *Jones* with respect at least to the reviewability by habeas corpus of confrontation claims,[38] and the fact that the broad federal remedy will operate to review Arizona convictions in the first instance if Arizona courts refuse to provide a forum, it is not difficult to anticipate a future development of Arizona law inexorably following the federal lead.

Cognizable Non-Constitutional Claims[39]

Non-constitutional claims for habeas corpus relief seem to fall into a pattern different from their constitutional counterparts. Though habeas corpus may be employed in a frontal attack on the conviction itself as having been obtained in violation of state law,[40] its non-constitutional thrust more typically involves the rectification of a defect in an inmate's detention,[41] usually the length of a sentence. Because the validity of the

[33] *Id.* at 447, 432 P.2d at 459 (emphasis added). The court did not cite *Jones.*

[34] The history of the federal writ is concisely explored in Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle,* 39 N.Y.U.L. REV. 78-80 (1964).

[35] 306 U.S. 19 (1939).

[36] *Id.* at 24 (emphasis added).

[37] *E.g.,* Fay v. Noia, 372 U.S. 391, 411 (1963); Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle,* 39 N.Y.U.L. REV. 78, 79 (1964). *See also* Kaufman v. United States, 394 U.S. 217 (1969).

[38] Olivas v. Eyman, 104 Ariz. 163, 449 P.2d 942 (1969).

[39] These are claims which, while cognizable in state court, are not violative of the federal constitution; accordingly, they are never appropriate claims for federal habeas corpus. The category of cognizable non-constitutional claims, therefore, refers to matters which may lead to relief in a state habeas corpus proceeding because of a violation of state law or a state constitutional provision.

[40] *See, e.g.,* State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965) (habeas corpus available to attack felony conviction charged by information where defendant was not provided an adequate preliminary hearing as required in such cases by the state constitution).

[41] But the writ may not be used for the purpose of correcting alleged mistreatment of an inmate by prison authorities. Dutton v. Eyman, 95 Ariz. 96, 387 P.2d 799 (1963).

conviction itself is not usually at issue, the Arizona courts have not spoken in terms of whether a given error has ousted the convicting court of jurisdiction. Thus, the conceptual confusion surrounding habeas corpus in the constitutional area has not affected development of habeas in this context.

When the length of a sentence is at issue, habeas corpus is the proper vehicle for challenging the method of computation.[42] It also has been used to determine whether sentences imposed were intended to run concurrently or consecutively,[43] and to determine whether a sentencing court is required by the indeterminate sentencing statute to impose a minimum as well as a maximum sentence for second-degree murder.[44] And the Supreme Court of Arizona, in a habeas corpus proceeding, recently discussed the question of sentence credit for incarceration time spent by an inmate during a trial on an out-of-state charge.[45]

Though quantitatively rare, the non-constitutional aspect should not be dismissed as insignificant. On the contrary, its success ratio, when compared to that of its constitutional counterpart, clearly justifies its recognition as a truly viable component of the habeas arsenal.[46]

DRAFTING THE PETITION

General Requirements

Although Arizona courts dealing with habeas corpus petitions "look to substance not to form"[47] and, especially with *pro se* petitions, follow an announced policy of liberal construction,[48] the drafting of the petition is nevertheless quite important. When the drafting is performed by attorneys, the reason for the rule of liberality is largely absent, and the courts can be expected to require substantial compliance with the applicable statutes and rules.

Arizona Revised Statutes Annotated section 13-2002 sets forth the general requirements for the format of a habeas corpus petition. The

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[42] *E.g.*, Beaty v. Shute, 54 Ariz. 339, 95 P.2d 563 (1939).

[43] Bidgood v. State *ex rel.* Eyman, 6 Ariz. App. 314, 432 P.2d 280 (1967); McGilbry v. State *ex rel.* Eyman, 5 Ariz. App. 264, 425 P.2d 575 (1967).

[44] Ard v. State *ex rel.* Superior Ct., 102 Ariz. 221, 427 P.2d 913 (1967). The petition in *Ard* was actually for a writ of mandamus, but the court elected to treat it as a petition for habeas corpus even though the relief granted was a resentencing order rather than discharge.

[45] Walsh v. State *ex rel.* Eyman, 104 Ariz. 202, 450 P.2d 392 (1969).

[46] Perhaps its success is attributable in part to the fact that it does not seek to upset an entire conviction. In any event, it is noteworthy that the courts in Walsh v. State *ex rel.* Eyman, 104 Ariz. 202, 450 P.2d 392 (1969), Ard v. State *ex rel.* Superior Ct., 102 Ariz. 221, 427 P.2d 913 (1967), and McGilbry v. State *ex rel.* Eyman, 5 Ariz. App. 264, 425 P.2d 575 (1967), all held at least partially for the petitioner.

[47] Goodman v. State, 96 Ariz. 139, 393 P.2d 148 (1964).

[48] *E.g.*, Stuart v. State, 36 Ariz. 28, 282 P. 276 (1929); Cooper v. State *ex rel.* Eyman, 7 Ariz. App. 272, 438 P.2d 341 (1968); Hall v. State *ex rel.* Eyman, 6 Ariz. App. 259, 431 P.2d 699 (1967).

petition:

a. must be verified;[49]

b. must be signed either by the petitioner or by some person in his behalf;

c. must state that the petitioner is imprisoned or restrained of his liberty;

d. must state the place where (*e.g.*, Arizona State Prison) and the officer or person by whom (*e.g.*, the Superintendent) the petitioner is confined or restrained;

e. must name all the parties to the suit if they are known, or must describe them if they are not known; (Normally, this requirement simply duplicates the previous one.)

f. must state the particulars of the alleged illegality.

The last of the above requirements is by far the most important; in fact, it is perhaps the only indispensable element[50] of the petition. A statement of specific facts, rather than legal conclusions, must be alleged to prevent summary dismissal of the petition. Judge Molloy of the Arizona Court of Appeals concisely stated the rule in *In re Buccheri*:[51]

> *Pro se* petitions for habeas corpus relief should be liberally construed and read with a measure of tolerance. However, a petitioner is still required to allege *facts*, which if proved, would entitle him to relief. Mere conclusional allegations, unsupported by facts, will not suffice to require a court to grant a hearing on the petition. [citations omitted].

As illustration, an allegation that one was sentenced to a certain term of imprisonment which has now expired is sufficient,[52] whereas an allegation that the prosecution suppressed favorable evidence is, alone, not enough.[53] Though the conclusional allegation requirement is the most common pitfall of proper person petitioners, it should pose no particular problem for the legally trained draftsman.[54]

Special Requirements

As will be explained in the following section, two Arizona courts—the superior court and the supreme court—have original jurisdiction in habeas corpus matters. But when the original jurisdiction of the su-

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49 Some officials at the Arizona State Prison are available to notarize petitions.

50 Curiously, this statutory requirement is stated *conditionally*: "If the imprisonment is alleged to be illegal, the petition shall also state the particulars of the alleged illegality." ARIZ. REV. STAT. ANN. § 13-2002 (1956).

51 6 Ariz. App. 196, 206, 431 P.2d 91, 101 (1967). *See also* State *ex rel.* Patterson v. Superior Ct., 26 Ariz. 584, 587, 229 P. 96, 97 (1924).

52 Stuart v. State, 36 Ariz. 28, 282 P. 276 (1929).

53 Cooper v. State *ex rel.* Eyman, 7 Ariz. App. 272, 438 P.2d 341 (1968).

54 Further drafting hints can be gleaned from SOKOL, *supra* note 10, at 91-95. Sokol also provides a form for federal habeas corpus which can be modified for state petitions. *Id.* at 287-89. *See also* F. BAILEY & H. ROTHBLATT, COMPLETE MANUAL OF CRIMINAL FORMS 639 (1968).

preme court is invoked, additional drafting requirements should be anticipated.[55]

In applying for a writ under the original jurisdiction of the Supreme Court of Arizona, counsel should seek to comply with Rules 1(a) and 1(b)(1) of the *Rules of the Supreme Court of Arizona.*[56] The requirements of rule 1(a) are:

1. a typewritten or printed petition;
2. an accompanying memorandum of points and authorities;
3. service of the petition on the adverse party;
4. the filing of six copies of the application with the clerk of court.[57]

Rule 1(b)(1) places upon the petitioner the burden of convincing the supreme court that the writ should issue from that court and not from the superior court in which the application might lawfully have been made in the first instance. This rule requires that the petition

> set forth the circumstances which in the opinion of the applicant render it proper that the writ should issue originally from this court and not from . . . [the superior] court. If the court finds such circumstances insufficient, the court will on that ground refuse to order issuance of the writ.[58]

FILING: CHOICE OF COURT

In Arizona, original habeas corpus jurisdiction is concurrently vested in the supreme court[59] and the superior court.[60] However, persons

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55 A model petition for the supreme court is provided in J. CAMERON, ARIZONA APPELLATE FORMS & PROCEDURES 187 (1968).

56 17 ARIZ. REV. STAT. ANN. (1956).

57 Actually, although the rule only requires filing six copies, the court prefers receiving seven copies: one for the file, one for each of the five justices, and one to refer to the Attorney General for a response (even though the Attorney General may have already been served a copy by the petitioner). Filing seven copies will probably serve to expedite the court's consideration of the petition.

58 It is unfortunate, especially with regard to *pro se* petitions, that summary denial might result simply from filing in the supreme court instead of in superior court. *See* Montgomery v. Eyman, 96 Ariz. 55, 391 P.2d 915 (1964). Instead, the petition ought to be transferred to the superior court, *cf.* ARIZ. REV. STAT. ANN. § 12-120.22(B) (Supp. 1969) (transfer of appeals between supreme court and court of appeals), or at the very least the denial should state that it is without prejudice to refiling in superior court.

59 ARIZ. CONST. art. 6, § 5(1), (4).

60 ARIZ. CONST. art. 6, §§ 14, 18. *See also* ARIZ. REV. STAT. ANN. § 12-123 (1956). Until July, 1969, the court of appeals also had original jurisdiction in habeas corpus matters. *Compare* ARIZ. REV. STAT. ANN. § 12-120.21(A) *as amended,* (Supp. 1969-70) *with* its statutory predecessor, ARIZ. REV. STAT. ANN. § 12-120.21(A)(1), (4) (Supp. 1969). Removal of that court's original habeas jurisdiction will serve to streamline the state's habeas procedure without substantially affecting the remedies of prison inmates. Because the court of appeals is an intermediate appellate court of quite limited authority, it would generally be strategically unwise to file originally in that court even if its original habeas jurisdiction had not been impaired. A case presenting novel legal questions is probably destined for supreme court review, and its initial filing in the court of appeals would simply delay an expeditious resolution of the question. And a case presenting a factual issue that cannot be resolved in petitioner's favor by an examination of the

preparing to file habeas corpus petitions should not be misled into viewing the choice as unimportant.[61]

Superior Court

In practice, most petitions are filed in the Superior Court of Pinal County, the only superior court constitutionally enabled to handle habeas corpus petitions of inmates confined in the Arizona State Prison.[62] One instance where superior court filing would probably be wise is where the only precedent in point is a favorable decision by the court of appeals. Also, for the typical case, usually involving a factual clash, initial filing in superior court is probably appropriate. Special circumstances of the sort outlined below ought to be present before bypassing the superior court and filing originally in the supreme court.[63]

Supreme Court

As a rule of thumb, cases involving primarily questions of law rather than factual disputes might properly be considered for supreme court filing. Even if some factual dispute does exist, important legal questions of first impression or attempts at overruling prior precedents might well deserve initial supreme court action. In such cases the supreme court is empowered to retain jurisdiction of the case but to refer it to a superior court for fact-finding purposes.[64] Initial resort to the supreme court would also seem proper when the only precedent in point is an unfavorable decision by the court of appeals. Finally, if relief within the Arizona court system seems highly unlikely, original supreme court filing may expedite exhaustion of state remedies and quickly ripen the case for federal review.[65]

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record would be quite inappropriate for original consideration by the court of appeals since that court, unlike the supreme court, lacks the power to refer the case to the trial level for fact-finding. *In re* Buccheri, 6 Ariz. App. 196, 198, 431 P.2d 91, 93 (1967). *See also In re* Parham, 6 Ariz. App. 191, 431 P.2d 86 (1967) (to compensate partially for its lack of fact-finding power, the court of appeals can issue a writ of certiorari to obtain superior court records). Had the court retained its original jurisdiction, the ideal time to invoke it would be in the extremely rare instance where petitioner's claim, factually undisputed, presented a relatively minor legal question which had never been decided by the supreme court and which had previously been resolved more or less in petitioner's favor at the court of appeals level.

[61] Regardless of where the petition is filed, no filing fee is required (ARIZ. REV. STAT. ANN. §§ 13-2023 and 12-321 (1956)) and, apart from possible abuse of remedy limitations, no time restriction on original filing exists. *In re* Billie, 6 Ariz. App. 65, 429 P.2d 699 (1967), *vacated on other grounds*, 103 Ariz. 16, 436 P.2d 130 (1968).

[62] The state prison is in Florence, the county seat of Pinal County, and the state constitution permits superior courts to entertain habeas corpus actions only of persons in custody within the county of the court. ARIZ. CONST. art. 6, § 18. *See* Eyman v. Deutsch, 92 Ariz. 82, 373 P.2d 716 (1962).

[63] ARIZ. SUP. CT. R. 1(b)(1).

[64] ARIZ CONST. art. 6, § 5; ARIZ. REV. STAT. ANN. § 13-2003 (1956).

[65] It should be noted that supreme court denial will not necessarily constitute

JUDICIAL ACTION[66]

Original

Upon reviewing a habeas petition that is merely conclusory or one that contains facts insufficient to state a prima facie case for relief, the court may summarily deny the application without either referring it to the Attorney General for a response or holding an evidentiary hearing.[67] Similarly, summary denial by the supreme court or superior court is proper where it is clear from the petition that the applicant is relying upon repetitious matter asserted in previous unsuccessful petitions before the same court,[68] and superior court denial is proper where the petitioner had previously been denied relief by the supreme court on the grounds asserted.[69]

If the petition contains sufficient factual allegations, the court will ordinarily issue an order to show cause or refer the petition to the Attorney General for a response.[70] When the court receives the Attorney General's response,[71] it will decide whether a plenary hearing is necessary.[72] If the response concedes the truth of the petitioner's allegations, relief may be granted without a hearing. And if the response demonstrates that the record refutes the applicant's allegations, relief will in all likelihood be denied without a hearing, for "if the record . . . belies the allegations of a petition by the accused, the record, absent the most exceptional circumstances, should prevail."[73] If the pleadings present a true clash of verified assertions of fact not rebutted by the record, however, an evidentiary hearing will be in order.[74]

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exhaustion, since a denial could be based on improper invocation of original supreme court jurisdiction. *See* Montgomery v. Eyman, 96 Ariz. 55, 391 P.2d 915 (1964). However, if the record is silent as to the grounds for denial, the federal court should find the exhaustion requirement met. And surely, where the supreme court, before denying the petition, took some action with respect to the case, such as referring it to the Attorney General for a response, exhaustion should be satisfied, particularly if the gist of the Attorney General's responsive pleading went to the merits and not to considerations of original jurisdiction.

[66] The applicable statutes governing judicial action are ARIZ. REV. STAT. ANN. § 13-2001 *et seq.* (1956).

[67] *E.g.*, Ponds v. State *ex rel.* Eyman, 7 Ariz. App. 276, 438 P.2d 423 (1968); Landers v. State *ex rel.* Eyman, 7 Ariz. App. 197, 437 P.2d 681 (1968).

[68] Oppenheimer v. Boies, 95 Ariz. 292, 389 P.2d 696 (1964). *But see* Montgomery v. Eyman, 96 Ariz. 55, 391 P.2d 915 (1964) (consideration on appeal of a petition similar to one previously denied when original jurisdiction was invoked; original denial may not have been on merits).

[69] Hall v. State *ex rel.* Eyman, 6 Ariz. App. 259, 431 P.2d 699 (1967).

[70] *See, e.g.*, ARIZ. SUP. CT. R. 1(e).

[71] ARIZ. REV. STAT. ANN. § 13-2008(A) (1956).

[72] Indigent petitioners have no right to assigned counsel at such a hearing. Hackin v. State, 102 Ariz. 218, 427 P.2d 910 (1967); *The Arizona Supreme Court 1967-68*, 10 ARIZ. L. REV. 148, 167 (1968).

[73] *In re* Parham, 6 Ariz. App. 191, 195, 431 P.2d 86, 90 (1967).

[74] For a description of the hearings in federal court, which parallel the Arizona procedure, see SOKOL, *supra* note 10, at 102-32.

Appellate

Appellate review in habeas corpus matters is provided for by *Arizona Revised Statutes Annotated* section 12-2101(L),[75] which permits a petitioner to appeal an order refusing his discharge and permits the warden to appeal an order discharging the petitioner.[76] An Arizona State Prison inmate desiring review of an adverse Pinal County Superior Court habeas decision must seek initial appellate action in division two of the court of appeals.[77] Since habeas appeals in Arizona are governed by the provisions of the civil code,[78] the appeal should be perfected according to those rules.[79] It would seem, however, that if a petitioner for some reason fails to perfect his appeal properly, or does not wish to encounter the delays of the normal appellate process, he may in a proper case possibly be able to have the supreme court pass on his petition if he files anew in that court,[80] invoking its original habeas corpus jurisdiction.

DELAYED APPEAL

In Arizona, a defendant desiring to appeal his conviction must, under Rule 348(A) of the *Arizona Rules of Criminal Procedure*,[81] do so within 60 days after entry of the judgment or sentence. But the Supreme

[75] Though that statute authorizes appeal to the supreme court, it should be read in conjunction with ARIZ. REV. STAT. ANN. § 12-120.21(A)(2) (Supp. 1969), which, in effect, requires initial appellate consideration of the case by the court of appeals.

[76] In appropriate cases, review may be had by extraordinary writ. *E.g.*, State v. Superior Ct., 103 Ariz. 208, 439 P.2d 294 (1968) (prohibition); Buell v. Superior Ct., 96 Ariz. 62, 391 P.2d 919 (1964) (certiorari); State *ex rel.* Ronan v. Superior Ct., 94 Ariz. 414, 385 P.2d 707 (1963) (prohibition); State *ex rel.* Patterson v. Superior Ct., 26 Ariz. 584, 229 P. 96 (1924) (certiorari); State *ex rel.* Galbreath v. Superior Ct., 22 Ariz. 452, 197 P. 537 (1921) (certiorari); Eyman v. Superior Ct., 9 Ariz. App. 6, 448 P.2d 878 (1968) (prohibition). *See generally* ARIZONA LAW INSTITUTE, EXTRAORDINARY WRITS IN ARIZONA (1967), and Lesher, *Extraordinary Writs in the Appellate Courts of Arizona*, 7 ARIZ. L. REV. 34 (1965). *See also* Arizona Weekly Gazette, Aug. 5, 1969, § A at 1, col. 2 (new Supreme Court of Arizona rule on extraordinary writs); Nelson, *The Rules of Procedure for Special Actions: Long Awaited Reform of Extraordinary Writ Practice in Arizona*, p. 413 *infra*.

[77] ARIZ. REV. STAT. ANN. § 12-120.21(B) (Supp. 1969); In re Buccheri, 6 Ariz. App. 196, 199, 431 P.2d 91, 94 (1967).

[78] Boies v. Anderson, 6 Ariz. App. 563, 435 P.2d 70 (1967). *See also In re* Belmas, 25 Ariz. 235, 215 P. 728 (1923), and Musgrove v. State, 24 Ariz. 582, 211 P. 594 (1923).

[79] *See* ARIZ. R. CIV. P. 73(b), 16 ARIZ. REV. STAT. ANN. (1956) (notice of appeal should be filed with superior court within 60 days from entry of order appealed from). *See* ARIZ. REV. STAT. ANN. § 12-120.22(A) (Supp. 1969) (appeals to court of appeals shall follow procedure and time table of appeals to the supreme court). Although rule 73(b) requires a bond for costs on appeal, ARIZ. REV. STAT. ANN. § 13-2023 (1956) (and perhaps §§ 12-321 and 12-120.31) should be read to except habeas corpus appeals.

[80] *See, e.g., In re* Buccheri, 6 Ariz. App. 196, 198, 431 P.2d 91, 93 (1967); *In re* Parham, 6 Ariz. App. 191, 192, 431 P.2d 86, 87 (1967); *In re* Billie, 6 Ariz. App. 65 n.1, 429 P.2d 699 n.1 (1967), *vacated on other grounds*, 103 Ariz. 16, 436 P.2d 130 (1968) (original proceeding after similar petition denied by superior court). Perhaps this result is also attributable to the exemption of habeas corpus from normal restrictions of res judicata. *See* Sanders v. United States, 373 U.S. 1, 15-17 (1963).

[81] 17 ARIZ. REV. STAT. ANN. (1956).

Court of Arizona, on April 29, 1964, promulgated its rule 16(a) relaxing the rigid 60-day time limitation in certain circumstances.[82] To apply properly for a delayed appeal under rule 16(a),[83] the inmate must

a. apply to the court by written motion supported by affidavit, and

b. demonstrate in the application his faultlessness in failing to appeal within the 60-day period.

Judge Cameron, in his work on Arizona appellate practice, provides a suggested form for delayed appeal applications.[84]

Because the rule is new and largely uninterpreted,[85] not much guidance has been provided on the meaning of the "faultlessness" requirement beyond its definition in *State v. Montez*[86] as "circumstances or events beyond . . . [the applicant's] control." To glean information on the practical operation of the rule in the bulk of cases decided without a written opinion,[87] the authors examined the pleadings and case files of all favorable delayed appeal decisions handed down by the supreme court since the rule went into effect. Those pleadings presumably reveal what the court considers a prima facie case for rule 16(a) relief.[88]

The typical meritorious case involves a defendant who was never

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[82] ARIZ. SUP. CT. R. 16(a). The rule reads as follows:

> A defendant who has, without fault on his part, failed to take an appeal within the sixty days prescribed by Rule 348 of the Rules of Criminal Procedure may, by written motion supported by affidavit, apply to this court for an order permitting him to take a delayed appeal. The clerk shall forthwith notify the attorney general who shall respond to such motion within five days.

Actually, even before rule 16(a), the supreme court under very extreme circumstances tolerated a slight filing delay. State v. Schroeder, 95 Ariz. 255, 389 P.2d 255 (1964). If a delayed appeal is possible, an inmate must apparently avail himself of it before challenging his conviction in federal court. *See* Montez v. Eyman, 372 F.2d 100 (9th Cir. 1967).

[83] Here, as with habeas corpus applications, the courts are not terribly concerned with form and terminology. In the interest of justice, for example, the Supreme Court of Arizona will presumably treat as an application for a delayed appeal a document mislabeled a petition for habeas corpus. *See* State v. Montez, 102 Ariz. 444, 432 P.2d 456 (1967); *In re* Acosta, 97 Ariz. 333, 400 P.2d 328 (1965). But attorneys ought to recognize the distinction and avoid the needless confusion caused by improper captioning.

[84] J. CAMERON, ARIZONA APPELLATE FORMS AND PROCEDURE 78-79 (1968). Judge Cameron suggests a distribution of six copies to the clerk of the appellate court, in addition to service of one copy on the Attorney General. But since the court prefers to refer a copy of the motion to the Attorney General even when the Attorney General has already been served, filing seven copies with the court would probably expedite consideration of the motion. See note 57 *supra.*

[85] The only reported decisions appear to be State v. Montez, 102 Ariz. 444, 432 P.2d 456 (1967); *In re* Acosta, 97 Ariz. 333, 400 P.2d 328 (1965); *In re* Willits, 97 Ariz. 332, 400 P.2d 327 (1965); *In re* Lopez, 97 Ariz. 328, 400 P.2d 325 (1965). Because of its heavy caseload, the supreme court generally decides delayed appeal applications by minute entry order, without an accompanying opinion.

[86] 102 Ariz. 444, 447, 432 P.2d 456, 459 (1967).

[87] *See* note 85 *supra.*

[88] In some cases, where there is a factual clash relating to the rule 16(a) requirements, the supreme court sends the case to a superior court for fact-finding purposes. *E.g., In re* Gardner, No. 1982 (Ariz. Sup. Ct., April 1, 1969).

advised of his right to appeal by his attorney or by the court,[89] or who was never advised of his right to an assigned appellate attorney,[90] or who honestly but incorrectly assumed his attorney was going to appeal,[91] or, as in one reported decision, whose attorney failed to appeal within the 60-day limit after telling the defendant he was planning to appeal.[92] Other examples include a defendant who wrote his attorney during the 60-day period but received no answer,[93] and an inmate who, during the 60-day period, was put in isolation at the prison for disciplinary reasons and was thus unable to contact his attorney.[94] Plainly, however, a defendant's decision not to appeal, or the acquiescence by a defendant in his attorney's advice not to appeal,[95] will preclude the possibility of a subsequent delayed appeal.

Though the delayed appeal provision is a supreme court rule, it is also available in appeals to the court of appeals.[96] In fact, since the court of appeals has jurisdiction over all criminal appeals except those where

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[89] *E.g., In re* Daniels, No. 1997 (Ariz. Sup. Ct., March 27, 1969); *In re* Fowler, No. 1989 (Ariz. Sup. Ct., Feb. 18, 1969).

Quite often, a convicted defendant is not advised of his right to appeal when the conviction results from a plea of guilty, since the court and defense counsel (if the defendant was represented) probably expect that the defendant is not interested in an appeal.

In Arizona, a plea of guilty does not vitiate one's right to appeal his conviction. State v. Vineyard, 96 Ariz. 76, 392 P.2d 30 (1964). But it does severely limit the available grounds for appeal, often restricting it to a review of the sentence imposed. Nevertheless, inmates often desire to appeal on that ground, and Arizona is one of a minority of jurisdictions permitting appellate review of lawful but excessive sentences. ARIZ. REV. STAT. ANN. § 13-1717(B) (1956). Obtaining relief on that ground is in practice next to hopeless, however. The Supreme Court of Arizona has virtually renounced its statutory authority to reduce lawful sentences. Typical of the court's view is the oft-cited case of State v. Maberry, 93 Ariz. 306, 309, 380 P.2d 604, 606 (1963), holding in effect that a sentence within the statutory minimum and maximum will not be upset absent a showing of a clear abuse of discretion by the trial judge. Only in the most extreme cases has the court modified a sentence. State v. Fierro, 101 Ariz. 118, 416 P.2d 551 (1966) (17-year-old defendant given 10 to 12-year robbery sentence; minimum reduced to 5 years); State v. Valenzuela, 98 Ariz. 189, 403 P.2d 286 (1965) (death sentence of guilty-pleading defendant reduced to life where codefendant who played major role pleaded not guilty and was given life by jury); State v. Telavera, 76 Ariz. 183, 261 P.2d 997 (1953) (10 to 20-year statutory rape sentence of 17-year-old reduced to 7 to 10 years).

[90] *In re* Johns, No. 1926 (Ariz. Sup. Ct., Sept. 17, 1968); *In re* Forteson, No. 1749 (Ariz. Sup. Ct., Dec. 13, 1966).

[91] *E.g., In re* Goodwin, No. 2002 (Ariz. Sup. Ct., April 15, 1969); *In re* Kennedy, No. 1988 (Ariz. Sup. Ct., Feb. 18, 1969); *In re* Brookshire, No. 1895 (Ariz. Sup. Ct., April 11, 1968).

[92] *In re* Acosta, 97 Ariz. 333, 400 P.2d 328 (1965). *See also In re* Hansen, No. 1886 (Ariz. Sup. Ct., Sept. 23, 1968); *In re* Councilman, No. 1877 (Ariz. Sup. Ct., March 5, 1968).

[93] *In re* Rackley, No. 1798 (Ariz. Sup. Ct., March 4, 1969).

[94] *In re* Rivera, No. 1735 (Ariz. Sup. Ct., Nov. 2, 1966).

[95] State v. Montez, 102 Ariz. 444, 447, 432 P.2d 456, 459 (1967).

[96] ARIZ. REV. STAT. ANN. § 12-120.22(A) (Supp. 1969) states: "Appeals to the court of appeals shall be taken from the superior court in the manner prescribed for appeals to the supreme court and within like time." For an example of a delayed appeal granted by the court of appeals, see State v. Sheppard, 2 Ariz. App. 242, 407 P.2d 783 (1965).

the maximum possible penalty is death or life imprisonment,[97] it would seem that many delayed appeal applications can be made to that court.[98] And, unlike habeas corpus appeals, which must be filed by Arizona State Prison inmates only in division two of the court of appeals,[99] a delayed appeal motion should be filed in the division of the court of appeals encompassing the county in which the inmate was convicted.[100]

MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE

The motion for a new trial, if based on newly discovered evidence, is another post-conviction remedy available to prison inmates. Although a motion for new trial on other bases must normally be made within three days after the verdict, Rule 308 of the *Arizona Rules of Criminal Procedure* specifies that such a motion based on newly discovered evidence "may be made within one year after the rendition of the verdict or the finding of the court, or at a later time if the court for good cause permits."

REQUIREMENTS

Rule 310(3) of the *Arizona Rules of Criminal Procedure* provides that a new trial should be granted if it can be established

> [t]hat new and material evidence, which if introduced at the trial would probably have changed the verdict of the finding of the court, is discovered which the defendant could not with reasonable diligence have discovered and produced upon the trial.

The text of the rule reveals several requirements that should be satisfied before the motion is granted. The "evidence" must be "new" and "material," must be capable of changing the verdict, and must not have been discoverable earlier by the exercise of "reasonable diligence." The rule is reasonably easy to comprehend. Indeed, some of its elements are virtually self-explanatory. For example, the motion must be based on *evidence.* Hence, a mere speculative theory is not sufficient, and a motion founded on such a theory would surely fail.[101] The *newness* requirement, though it has bred some conceptual confusion,[102] refers simply

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[97] ARIZ. REV. STAT. ANN. § 12-120.21(A)(1) (Supp. 1969). A motion for a delayed appeal in a case where the *maximum possible* penalty (not necessarily the penalty actually imposed) is death or life imprisonment should be filed with the supreme court. *See* State *ex rel.* Corbin v. Court of Appeals, 103 Ariz. 315, 441 P.2d 544 (1968).

[98] Because of a liberal transfer statute, however, filing in the wrong court should not lead to dismissal. *See* ARIZ. REV. STAT. ANN. § 12-120.22(B) (Supp. 1969).

[99] *See* note 77 *supra,* and accompanying text.

[100] Division one consists of the counties of Maricopa, Yuma, Mohave, Coconino, Yavapai, Navajo and Apache. ARIZ. REV. STAT. ANN. § 12-120(C) (Supp. 1969). Division two consists of the counties of Pima, Pinal, Cochise, Santa Cruz, Greenlee, Graham and Gila. ARIZ. REV. STAT. ANN. § 12-120(D) (Supp. 1969).

[101] State v. Schroeder, 100 Ariz. 21, 23, 409 P.2d 725, 727 (1966).

[102] Often, the newness requirement is confused with the requirement of due

to evidence that has come to light subsequent to the trial.

Harsh as it may be to penalize a defendant for his counsel's lack of ability or effort, *due diligence* is nevertheless an independent requirement that must be met when moving for a new trial. The defendant must allege facts, preferably buttressed by affidavit, from which the court may infer that due diligence was exercised in an attempt to produce the evidence at the original trial.[103] Indeed, despite the discovery of evidence of verdict-changing ability, a new trial motion will be denied where "the record is devoid of any showing by the defendant of 'reasonable diligence' in attempting to discover" the evidence.[104] In cases where evidence indicating innocence of the crime in question is uncovered but a new trial is denied on due diligence grounds,[105] an application for commutation of sentence, though an exceptional remedy, might be the next avenue to consider.[106]

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diligence. *See, e.g.*, Rosser v. State, 45 Ariz. 264, 266, 42 P.2d 613 (1935): "Any evidence that was known by the defendant before his trial, or which might have been known by him in the exercise of ordinary care, is not newly discovered." Furthermore, it is sometimes said that post-trial recollection of facts does not constitute newly discovered evidence. State v. Sims, 99 Ariz. 302, 310, 409 P.2d 17, 22 (1965). But the true basis underlying the post-trial recollection rule was revealed in State v. Daymus, 93 Ariz. 332, 334, 380 P.2d 996, 997 (1963): "Information within the personal knowledge of defendant does not become newly discovered evidence by reason of later recollection . . . *at least where there is no showing of . . . diligence.*" (emphasis added). Therefore, if it could be shown that the defendant at the time of trial tried diligently but futilely to recall certain facts, or if it could be shown that the defendant's inability to recall was caused by something other than his negligence (*e.g.*, amnesia), the post-trial recollection rule should not preclude the success of a rule 310(3) motion based on facts recalled subsequent to the trial.

103 It is helpful for the defendant to account for his failure to present the evidence by explicitly stating details of his efforts to ascertain and produce it. See the defense counsel's affidavit reproduced in State v. Turner, 92 Ariz. 214, 375 P.2d 567 (1962).

104 State v. Dixon, 7 Ariz. App. 457, 459, 440 P.2d 918, 920 (1968).

105 Exculpatory testimony from a witness whose identity was known at the time of trial will not support a new trial motion where counsel did not at the time of trial make a diligent effort to locate, interview and procure the testimony of the witness. State v. Maloney, 101 Ariz. 111, 416 P.2d 544 (1966); State v. Baker, 100 Ariz. 339, 414 P.2d 153 (1966); State v. Mahan, 92 Ariz. 271, 376 P.2d 132 (1962); State v. Love, 77 Ariz. 46, 266 P.2d 1079 (1954); Rosser v. State, 45 Ariz. 264, 42 P.2d 613 (1935). In an extreme case, an ineffective assistance of counsel claim may lead to relief. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964); Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531 (1963).

106 In Arizona the power to commute rests solely with the governor. ARIZ. CONST. art. 5, § 5; ARIZ. REV. STAT. ANN. § 31-443 (1956). But the governor's commutation power may be exercised only when such relief is first recommended by the Board of Pardons and Paroles. ARIZ. REV. STAT. ANN. § 31-402(A) (1956). Moreover, where the offender is a two-time felon, the governor's commutation power seems to be further conditioned upon the written recommendation of a majority of the judges of the supreme court. ARIZ. REV. STAT. ANN. § 31-444(B) (1956); Arizona Dep't of Law Letter Op. No. 69-7-L(R-58) (March 18, 1969). In addition, for selected substantive offenses, commutation is statutorily unavailable until the expiration of a stated number of years, *e.g.*, ARIZ. REV. STAT. ANN. § 36-1002 (1956), and for certain other offenses—typically special recidivist charges—commutation is by statute completely unavailable. *E.g.*, ARIZ. REV. STAT. ANN. §§ 13-245(C), -248(B), -249(B), -302(C), -457(B), -491(D), -521(B), -541(B), -614(C), -643(B),

The *verdict-changing* standard, which seems to embrace the statutory materiality requirement,[107] demands that the new evidence be likely to result in an acquittal on retrial[108] or, at the least, in a conviction of a lesser offense.[109] Even though leniency on the part of a trial court in finding the verdict-changing standard satisfied will not ordinarily be upset by an appellate tribunal,[110] lower courts, obviously giving effect to a policy favoring finality in criminal litigation, are usually quite insistent that the standard be strictly met. Crucial to a determination of the verdict-changing capability of new evidence is an analysis of the nature and extent of the evidence introduced at the original trial—the weaker the original evidence, the greater the chance for a new trial.[111]

-671(C) (1956).

Commutation in Arizona seldom results in outright release from prison. In some instances, it involves converting a capital sentence to a sentence of life imprisonment. More often, it involves establishing a parole eligibility date for one who was previously ineligible for parole, or reducing the parole eligibility date for an offender with a previous eligibility date far in the future. Thus, after a commutation, most offenders will leave prison under the supervision of the parole board, rather than unconditionally.

Application for commutation should be made on the prescribed form which is a one-page document setting forth the inmate's minimum parole date, maximum expiration date, institutional record, prior record (including arrests), an institutional recommendation (good, fair, questionable), the inmate's anticipated home and employment plans if released, and a brief paragraph setting forth the inmate's reasons for feeling himself deserving of a sentence reduction. Before acting on a commutation application, the parole board must give notice to the relevant county attorney and trial judge and wait 30 days for their recommendations, if any. ARIZ. REV. STAT. ANN. § 31-411(C) (1956). A commutation hearing by the board is required only in capital cases, McGee v. Board of Pardons and Paroles, 92 Ariz. 317, 376 P.2d 779 (1962), but as a matter of practice such hearings seem to be held in non-capital cases as well. The governor, upon granting a commutation, may attach appropriate conditions to the grant. ARIZ. REV. STAT. ANN. § 31-443 (1956). At the beginning of each regular legislative session, the governor must submit to the legislature a report on each commutation granted. ARIZ. REV. STAT. ANN. § 31-446 (1956).

The literature on executive clemency, particularly with regard to the factors entering into a commutation decision, is sparse. One valuable empirical study, which focuses on capital cases but which should have relevance beyond that area, is Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964).

107 *See* note 115 *infra*, and accompanying text.

108 State v. Turner, 92 Ariz. 214, 375 P.2d 567 (1962) (discovery after trial of knife that might well lend credence to defendant's claim of self-defense); Hunter v. State, 43 Ariz. 269, 30 P.2d 499 (1934) (affidavit filed stating that affiant, rather than defendant, had committed the crime). The extent to which newly discovered evidence of the *Hunter* variety must be credible in order to support a new trial motion is a matter of dispute. *Compare Hunter* and State v. Blankenship, 99 Ariz. 60, 406 P.2d 729 (1965) (must be credible), *with* State v. Sneed, 98 Ariz. 264, 403 P.2d 816 (1965) (motion can be granted despite question of credibility, since credibility is a jury question). If verdict-changing capacity is the test, some assessment by the motion court of credibility of the new evidence would seem essential, though all doubts should be resolved in the defendant's favor. *See also* State v. Turner, — Ariz. —, 455 P.2d 443 (1969) (adopting *Hunter* and *Blankenship* rationale).

109 *Cf.* State v. Myers, 59 Ariz. 200, 125 P.2d 441 (1942).

110 State v. Turner, 92 Ariz. 214, 218, 375 P.2d 567, 569 (1962).

111 State v. Sneed, 98 Ariz. 264, 403 P.2d 816 (1965) (new trial ordered where identification evidence at original trial was weak and where newly discovered evidence supported defendant's version of the facts). *But see* State v. Blankenship, 99 Ariz. 60, 406 P.2d 729 (1965) (new trial denied where newly discovered evidence

From a cursory reading of the case law, it might appear as though several subsidiary requirements have been judicially engrafted onto the express elements of the rule. For example, the cases repeatedly state that the newly discovered evidence must not be merely cumulative[112] or corroborative,[113] that it must not be merely impeaching,[114] and must not prove merely a collateral issue.[115] It is submitted, however, that these so-called subsidiary rules add nothing to the express elements of rule 310 (3); rather, a close analysis reveals them simply to be part and parcel of the requirement that the newly discovered evidence have a verdict-changing capacity. The Supreme Court of Arizona, for example, has justified the cumulative and impeachment exclusion on the ground that "such evidence does not have a substantial probability of changing the verdict."[116] And when the new evidence, though cumulative, has a real potential for altering the verdict, the court will not be limited by labels.[117] In practice, then, the court looks to see whether "the aggregate effect [of the newly discovered evidence] is to raise a serious doubt whether justice was done," for "this, after all, is the real subject of inquiry."[118]

Typological analysis of evidence, therefore, is useful only in classifying the kinds of evidence *ordinarily* viewed with judicial skepticism.[119]

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was widely at variance with the facts as established by testimony offered at the trial).

[112] *E.g.*, State v. Schantz, 102 Ariz. 212, 427 P.2d 530 (1967); State v. Baker, 100 Ariz. 339, 414 P.2d 153 (1966); State v. Villavicencio, 95 Ariz. 199, 388 P.2d 245 (1964); Williams v. Territory, 13 Ariz. 306, 114 P. 566 (1911).

[113] Post v. State, 41 Ariz. 23, 15 P.2d 246 (1932).

[114] *E.g.*, State v. Schantz, 102 Ariz. 212, 427 P.2d 530 (1967); State v. Thurston, 100 Ariz. 297, 413 P.2d 764 (1966). Typically, unsuccessful motions based on impeaching evidence consist of a witness' unsworn statement that is contradictory to his trial testimony. *See* Indian Fred v. State, 36 Ariz. 48, 282 P. 930 (1929).

[115] *E.g.*, Miranda v. State, 42 Ariz. 358, 369, 26 P.2d 241, 244 (1933). Perhaps this is identical to the "materiality" requirement, expressly mentioned in rule 310(3). *See also* Young Chung v. State, 15 Ariz. 79, 136 P. 631 (1913).

[116] State v. Thurston, 100 Ariz. 297, 302, 413 P.2d 764, 769 (1966). *See also* Young Chung v. State, 15 Ariz. 79, 92, 136 P. 631, 637 (1913), where the court stated, "[S]uch facts . . . are of an impeaching and cumulative character and not of a nature reasonably calculated to change the result of the trial." And in State v. Peters, 60 Ariz. 102, 104, 131 P.2d 814, 815 (1942), the court noted that impeachment evidence "*usually* does not justify a new trial." (emphasis added).

[117] *See* State v. Turner, 92 Ariz. 214, 218, 375 P.2d 567, 569 (1962): "Generally newly discovered evidence, *even though cumulative*, if material and of such weight as most likely would have changed the result of the trial had it been given, entitled defendant to a new trial provided due diligence is shown." (emphasis added). In *Turner*, the defendant at trial claimed she shot the victim in self-defense when he threatened her with a knife, but she was at that time unable to produce the knife; after trial, the knife was found and served as the basis for the new trial motion.

[118] State v. Romero, 77 Ariz. 229, 235, 269 P.2d 724, 728 (1954) (new trial ordered over the state's objection that the new evidence was cumulative and impeaching).

[119] Other types of evidence typically treated with judicial skepticism are alibi evidence, State v. Sims, 104 Ariz. 118, 449 P.2d 289 (1969), and recanted testimony, particularly where the witness recanting his testimony has nothing to lose by so doing. State v. Sims, 99 Ariz. 309, 409 P.2d 17 (1965); Cochrane v. State, 48 Ariz. 124, 59 P.2d 658 (1936). *See also* State v. Wise, 101 Ariz. 315, 419 P.2d 342 (1966).

In no event should attorneys refrain from filing—or courts from granting —motions based on newly discovered evidence of a verdict-changing variety merely because that evidence might be denominated "impeaching," "cumulative," or the like. In summation, then, the requirements for granting a new trial motion can analytically be reduced to "evidence," "newness," "verdict-changing capacity," and "due diligence."

MANDATORY VERSUS DISCRETIONARY NATURE

Despite disturbing language in some of the decisions, once the above requirements are actually satisfied, a favorable ruling on the motion would seem to be required. Rule 310 specifies that the court "shall" grant a new trial when the elements of the rule are met, and although section headings are not technically part of the law,[120] it is interesting to note that rule 310 is designated as a "mandatory" new trial rule.

However, courts often mechanically state that the decision to grant a new trial is discretionary and thus subject to reversal only upon a showing of arbitrariness,[121] but a close analysis reveals that the courts in those cases simply have been imprecise in their terminology. The confusion can well be illustrated by the following quotation from *State v. Schantz*:[122]

> This court has held that a new trial for newly discovered evidence *is mandatory if* its introduction at the trial would probably have changed the verdict and if the defendant could not, with reasonable diligence, have discovered and produced the evidence upon the trial. [citations omitted].
>
> Motions for new trial, however, are not looked upon with favor and should be granted with great caution, *and in the sound discretion of the court.* (emphasis added).

After discussing the new evidence, the *Schantz* court concluded: "The substance of the affidavit, being merely cumulative, we hold the trial court did not abuse its discretion in denying the motion for a new trial."[123] *Schantz*, in other words, properly affirmed the lower court's denial of the motion on the ground that the elements of rule 310(3) had not all been met, but its affirmance was improperly cast in "abuse of discretion" terminology. Therefore, when the language of *Schantz* and similar decisions is reconciled with the results reached, it is apparent that the courts actually are without discretion to deny a motion[124] once all the require-

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120 ARIZ. REV. STAT. ANN. § 1-212 (1956).

121 *E.g.*, State v. Blankenship, 99 Ariz. 60, 64, 406 P.2d 729, 731 (1965).

122 102 Ariz. 212, 214, 427 P.2d 530, 532 (1967). *See also* State v. Thurston, 100 Ariz. 297, 302, 413 P.2d 764, 767 (1966), and State v. Hill, 88 Ariz. 33, 39, 352 P.2d 699, 703 (1960), both indicating, as does *Schantz*, the mandatory nature of rule 310.

123 102 Ariz. at 215, 427 P.2d at 533.

124 Interestingly, however, lower courts are given the discretion to *grant* a motion even though the elements of rule 310 (or at least the verdict-changing element) have not been clearly established. State v. Turner, 92 Ariz. 214, 375 P.2d 567 (1962). Appellate courts, according to *Turner*, are more hesitant to overturn an order granting a new trial than they are with respect to one denying such relief.

ments of the rule have been established.[125]

MECHANICS

A defendant who has been tried[126] and convicted may move for a new trial whenever newly discovered evidence comes to light.[127] The motion should be in writing and served on the County Attorney[128] and should, unless an appeal has been perfected,[129] be filed with the clerk of the convicting court. Supporting affidavits of witnesses should be filed stating the details of the new evidence and the willingness of the witnesses to testify at a later trial.[130] An affidavit by defense counsel, showing his due diligence in attempting to ascertain the evidence at the earlier trial, might also be profitably attached.[131] The court may then examine the affidavits or hold an evidentiary hearing[132] to determine questions of fact.

If the defendant is also appealing his conviction, the new trial motion filed in the trial court will be denied on jurisdictional grounds, since during the pendency of an appeal the lower court loses jurisdiction over all matters except those in furtherance of the appeal;[133] and a new trial motion is not considered to be in furtherance of an appeal.[134] However, if a defendant discovers new evidence while his case is pending appeal, he is not altogether precluded from then pursuing a new trial motion. The motion may at that time be filed with an *appellate court*,[135] which may reinstate superior court jurisdiction for the limited purpose of taking appro-

125 The mandatory nature of relief under rule 310(3) should also apply to motions filed more than a year after verdict, even though, under rule 308, such motions may technically be filed only "if the court for good cause permits." The good cause requirement should not be equated with mere judicial discretion. Good cause should be found, and enforced by appellate courts, so long as rule 310(3) is entirely met and so long as the evidence was first uncovered after the one year filing period. Significantly, the decisions recognizing the mandatory nature of rule 310(3), such as *Schantz, Hill* and *Thurston,* do not distinguish between motions filed before and after the one year time period. In fact, the *Schantz* motion was filed a year and a half *after* the expiration of the one year filing period.

126 A defendant who has entered a plea of guilty has never been tried, and hence a motion for a new trial is not an appropriate remedy for such a defendant. Instead, habeas corpus or relief pursuant to Rule 60(c) of the *Arizona Rules of Civil Procedure* (discussed *infra*) should be considered. *See* State v. Churton, 9 Ariz. App. 16, 18 n.4, 448 P.2d 888, 890 n.4 (1968).

127 ARIZ. R. CRIM. P. 308.

128 ARIZ. R. CRIM. P. 309.

129 See textual discussion accompanying notes 133-134 *infra.*

130 State v. Romero, 77 Ariz. 229, 234, 269 P.2d 724, 728 (1954). *See also* Rosser v. State, 45 Ariz. 264, 266, 42 P.2d 613, 614 (1935).

131 State v. Romero, 77 Ariz. 229, 269 P.2d 724 (1954). The Supreme Court of Arizona in *Romero* commended counsel's zeal and reproduced in its opinion a copy of the motion and affidavit filed. Those documents can serve as useful guides to practitioners preparing to file new trial motions. *See also* State v. Schantz, 102 Ariz. 212, 427 P.2d 530 (1967).

132 ARIZ. R. CRIM. P. 312.

133 *E.g.,* State v. Churton, 9 Ariz. App. 16, 448 P.2d 888 (1968).

134 *E.g.,* State v. Peters, 60 Ariz. 102, 106, 131 P.2d 814, 816 (1942).

135 State v. Sims, 99 Ariz. 302, 409 P.2d 17 (1965); State v. Noriega, 5 Ariz. App. 572, 429 P.2d 459 (1967).

priate action on the motion. But an appellate court will not enter a remand order so as to permit the moving party "the opportunity to present the motion to the trial court,"[136] until it is satisfied that the evidence is legally sufficient. In addition, although it is not at all clear, decisional authority in an analogous area suggests that appellate court approval for a new trial motion must be obtained not only during the pendency of an appeal, but also after affirmance and issuance of the mandate.[137] It would seem, then, that initial approval by an appellate tribunal may be necessary except in instances when no appeal was taken from the conviction.

The denial of a new trial motion is appealable.[138] But, unlike an ordinary appeal from a judgment and sentence which can be taken within 60 days,[139] an appeal from an order denying a new trial must be taken within 20 days.[140]

RULE 60(c) MOTION

Rule 60(c) of the *Arizona Rules of Civil Procedure*, which has consistently been held applicable to criminal cases,[141] has the potential for providing a broadly based post-conviction remedy in the form of a motion to modify or vacate judgment. The rule, in relevant part, reads as follows:

> On motion and upon such terms as are just the Court may relieve a party . . . from a final judgment, order or proceeding for the following reasons:
>
> . . . .
>
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

Despite the rule's obvious potential, however, the rather confused body of case law surrounding it has to date prevented it from obtaining a stable footing.

The confusion centers around the crucial question of the availability of the remedy to defendants who have already commenced serving their prison sentences, and is traceable to the 1926 decision of *State v. McKelvey*.[142] Some degree of clarification can be achieved by exploring the historical development of the remedy and by placing *McKelvey* in its proper perspective.

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136 State v. Noriega, 5 Ariz. App. 572, 575, 429 P.2d 459, 462 (1967). *Noriega* notes that the appellate inquiry is not on the merits, and a remand order should not in itself lead the lower court to rule favorably on the motion.

137 Rogers v. Ogg, 101 Ariz. 161, 163, 416 P.2d 594, 596 (1966); State v. Noriega, 5 Ariz. App. 572, 575 n.1, 429 P.2d 459, 462 n.1 (1967). The discussion of *Noriega* in State v. Churton, 9 Ariz. App. 16, 448 P.2d 888 (1968), supports this interpretation.

138 ARIZ. R. CRIM. P. 348(B). The State may likewise appeal an order granting a new trial. *See* State v. Turner, 92 Ariz. 214, 375 P.2d 567 (1962).

139 ARIZ. R. CRIM. P. 348(A).

140 ARIZ. R. CRIM. P. 348(B).

141 *E.g.*, State v. Lopez, 96 Ariz. 169, 393 P.2d 263 (1964).

142 30 Ariz. 265, 246 P. 550 (1926).

HISTORICAL ANALYSIS

Exposition

The origin of applying civil code provisions to vacate judgments and orders in criminal cases can be found in *Condos v. Superior Court*,[143] a 1925 decision of the Supreme Court of Arizona. There, the court held applicable to criminal cases the "general rule of the common law that all the judgments, decrees, or other orders of a court . . . are in its control during the term at which they are rendered, and may during that term be set aside, vacated or modified, by that court."[144] But, since terms of court had by that time apparently been abolished in Arizona,[145] the *Condos* court held the term-of-court time limitation replaced by the six-month statutory limit prescribed by the predecessor to rule 60(c).[146]

Only a year later, *McKelvey* was decided and, without citing *Condos*, announced a conflicting rule. In *McKelvey*, the defendant, who had been sentenced to a term of imprisonment of nine months and had served only one-third of his sentence, sought to have the remaining six-month period suspended. The superior court ordered suspension of the remainder of the sentence, but the Supreme Court of Arizona, using language that for more than 40 years has plagued the development of the motion to vacate in a criminal context, held the lower court exceeded its jurisdiction.

> It appears to be the almost universal rule that as a matter of common law, where a defendant has entered upon the execution of a valid sentence, the court has no jurisdiction, even during the term at which the sentence was rendered, to set it aside and render a new sentence.[147]

Two years later, in *Sam v. State*,[148] *McKelvey* was reaffirmed, and its clear but tacit encroachment upon *Condos* was expressly noted. *Sam* also held that the perfection of an appeal divested the trial court of jurisdiction to vacate its judgments, even though the six-month statutory period had not yet expired.

For a while the law seemed clear, but recent judicial developments have again clouded the picture. In *State v. Lopez*,[149] a unanimous decision handed down in 1964, the Supreme Court of Arizona cast its opinion in sweeping language that seemed to ignore *McKelvey* and to resurrect the *Condos* standard. The court, conspicuously omitting reference to *McKelvey*, recounted the history of the local motion to vacate from *Condos*, through *Sam*, to the enactment of rule 60(c), which simply

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143 29 Ariz. 186, 239 P. 1032 (1925).
144 *Id.* at 190, 239 P. at 1033.
145 State v. Lopez, 96 Ariz. 169, 171, 393 P.2d 263, 265 (1964).
146 29 Ariz. at 190, 239 P. at 1033.
147 30 Ariz. at 267, 246 P. at 550.
148 33 Ariz. 421, 265 P. 622 (1928).
149 96 Ariz. 169, 393 P.2d 263 (1964).

replaced with a reasonableness standard the six-month time limitation of its statutory predecessor. Concluding its opinion, the *Lopez* court asserted boldly that

> the trial court in the absence of a specific rule or statute has inherent jurisdiction to modify and vacate its own judgments and orders in criminal cases, in accordance with Rule 60(c) of the Rules of Civil Procedure, as amended, unless such jurisdiction is sooner terminated by the perfecting of an appeal to the appellate court.[150]

Once again the law seemed clear, though this time the *Condos* approach seemed to have prevailed. But not long after the ink of the *Lopez* opinion had dried, the court in *State v. Barnes*,[151] confronted not with a 60(c) problem but with a related jurisdictional matter,[152] relied on and quoted extensively from *McKelvey*. And finally, in *State v. Moreno*,[153] the latest major supreme court case dealing with rule 60(c) in a criminal setting, the court, citing *Lopez*, *Condos*, and *Sam*, but not *McKelvey*, permitted an inmate who had already served over a year of his sentence to attack, via rule 60(c), an imperfect judgment of conviction.

The doctrinal confusion in Arizona's high court has understandably bewildered the court of appeals, causing the intermediate court to waver significantly in its construction of the 60(c) remedy. In *State v. Dixon*,[154] that court without hesitation accepted the broad approach of *Lopez*, but the same court, in *State v. Brown*,[155] has recently retreated from that position, holding simply that "[t]he extent to which rule 60(c) § 6 should be expanded to eradicate the [restrictive] *Barnes* and *McKelvey* common law principle must be decided on a case by case basis."[156]

Analysis

Notwithstanding the pendular precedents, a close look at *McKelvey* reveals that the uncertainty surrounding rule 60(c) can be limited to a narrow and relatively unimportant issue: the power of a trial court, once a defendant has commenced serving a sentence pursuant to a *concededly sound conviction*, to turn about-face and modify or vacate the valid judgment or sentence. *McKelvey*, after all, involved precisely that situ-

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150 *Id.* at 172, 393 P.2d at 266.

151 100 Ariz. 334, 414 P.2d 149 (1966).

152 The court denied the trial court's power at common law and under ARIZ. R. CRIM. P. 188 to permit the withdrawal of a guilty plea by a sentence-serving defendant who has not challenged the propriety of the plea.

153 102 Ariz. 399, 430 P.2d 419 (1967).

154 6 Ariz. App. 210, 431 P.2d 105 (1967).

155 9 Ariz. App. 323, 451 P.2d 901 (1969).

156 *Id.* at 325, 451 P.2d at 903. *Dixon* and *Brown* were both decided by division two of the court of appeals. Division two may now read rule 60(c) more restrictively than does division one. *See* State v. Adams, 4 Ariz. App. 298, 419 P.2d 739 (1966) (division one decision adopting *Lopez* rule).

ation,[157] and the *McKelvey* tribunal significantly held the trial court to be without jurisdiction to set aside its judgment only "where a defendant has entered upon the execution of a *valid* sentence . . . ."[158]

If *McKelvey* means, as suggested, only that a *valid* conviction and sentence cannot be vacated once the defendant has begun serving his sentence, it is obvious its limitation is not of major significance. Even were the remedy available in such circumstances, it is unlikely that courts would be inclined to vacate admittedly valid sentences.[159] Moreover, most actions where 60(c) relief may be reasonably anticipated will involve attacks on *defective* judgments or sentences, and it is plain under the most recent precedent, *State v. Moreno*,[160] that 60(c) is, despite *McKelvey*, available to upset these judgments or sentences even after service of sentence has commenced. An examination of the actual and potential use of rule 60(c) to attack invalid judgments of conviction should attest to the remedy's potential usefulness.

ACTUAL AND POTENTIAL USE

For the most part, 60(c) has been used as a remedy for setting aside guilty pleas. While habeas corpus would seem equally available in such instances,[161] rule 60(c) has nevertheless been employed to question the propriety of inducements to plead guilty,[162] to challenge the judicial acceptance of a plea without the court having first determined the degree of the defendant's guilt,[163] and to determine whether the act for which the defendant pleaded guilty actually constituted an offense under state law.[164]

Despite the prevalence of its use in connection with guilty pleas, rule 60(c) has hardly been restricted to that setting. For example, it has been used to question the validity of a conviction in the light of subsequent

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157 The lower court there sought belatedly to suspend the execution of the remainder of the defendant's valid sentence.

158 30 Ariz. at 267, 246 P. at 550.

159 One instance where relief, were it available, might be forthcoming is where probation is revoked because of the supposed commission of additional offenses, of which the defendant is subsequently acquitted. *Compare* State v. Dixon, 6 Ariz. App. 210, 431 P.2d 105 (1967), *with* State v. Brown, 9 Ariz. App. 323, 451 P.2d 901 (1969) (limiting *Dixon* to its precise facts).

160 102 Ariz. 399, 430 P.2d 419 (1967). Though *Moreno* dealt only with vacating void *judgments*, it is clear that a motion to vacate can also be used simply to challenge the legal propriety of a *sentence*. *See* Coleman v. State *ex rel.* Eyman, H-401 (Ariz. Sup. Ct., Sept. 30, 1969) (petition for writ of habeas corpus that claimed ambiguous consecutive sentences should be construed as concurrent treated by the supreme court as a motion to vacate sentence).

161 *See* State v. Churton, 9 Ariz. App. 16, 18 n.3, 448 P.2d 888, 890 n.3 (1968); *In re* Buccheri, 6 Ariz. App. 196, 431 P.2d 91 (1967). Violations of the rule of Boykin v. Alabama, 395 U.S. 238 (1969), setting stringent requirements for the acceptance by state courts of guilty pleas, can presumably be raised either by habeas corpus or by 60(c) motion.

162 State v. Churton, 9 Ariz. App. 16, 448 P.2d 888 (1968).

163 State v. Moreno, 102 Ariz. 399, 430 P.2d 419 (1967).

164 State v. Adams, 4 Ariz. App. 298, 419 P.2d 739 (1966).

decisional developments,[165] to reinstate probation where the defendant was later acquitted of the crimes for which his probation was revoked,[166] and, significantly, to attack a conviction after the sentence had been served.[167]

It should be evident that rule 60(c) relief has the potential of being a rough equivalent to habeas corpus relief. The case law has already recognized the similarities of 60(c) and habeas corpus, though not in explicit terms. *State v. Moreno*,[168] as we have seen,[169] states unequivocally that 60(c) may be used to challenge "void" judgments—a standard seemingly identical to the test for habeas corpus relief.[170] And the overlapping nature of the two remedies,[171] as well as the resemblance of their standards,[172] has not gone unnoticed by the Arizona courts.

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165 State v. Lopez, 96 Ariz. 169, 171-72, 393 P.2d 263, 265 (1964) (decision by Supreme Court of Arizona called into question the admissibility of Lopez' incriminating statement); State v. Adams, 4 Ariz. App. 298, 419 P.2d 739 (1966) (decision rendered five years after defendant's conviction raised some doubt concerning whether defendant's conduct was actually proscribed by Arizona law).

166 State v. Dixon, 6 Ariz. App. 210, 431 P.2d 105 (1967). In *Dixon*, although the court used broad *Lopez*-type language with respect to a trial court's inherent jurisdiction to vacate its own judgments, the facts were actually quite specific. The court at the time of revocation in effect conditioned the revocation on the outcome of the subsequent criminal proceedings. Recently, however, State v. Brown, 9 Ariz. App. 323, 325, 451 P.2d 901, 903 (1969), seems to have restricted *Dixon* to its facts: "Continuing jurisdiction exists to revoke revocation of probation contingent on a second trial outcome." Prior to *Brown*, when a defendant on probation was charged with another crime, trial courts, relying on broad statements in *Lopez* and *Dixon*, may have revoked probation without bothering expressly to condition the revocation on the outcome of the future criminal trial. Such courts may well have assumed that should the defendant be subsequently acquitted, they would be jurisdictionally able to reinstate probation regardless of whether the revocation had been cast in contingent terms. To take account of such possible trial court reliance on *Lopez* and *Dixon*, the rule of *Brown*, assuming it to be good law, should be applied only prospectively; *i.e.*, to revocations of probation occurring subsequent to the date of *Brown*. In any event, defense counsel representing a client at probation revocation proceedings triggered by the alleged commission by defendant of a new offense should, in light of *Brown*, request the court to use in its revocation order language that would leave the 60(c) door open in the event of a subsequent acquittal. That could be accomplished either by expressly conditioning the revocation of probation on the outcome of the future trial or, presumably, by following the more flexible approach of indicating that a subsequent acquittal may simply "go a long way toward" vitiating the revocation. *See* State v. Dixon, 6 Ariz. App. at 211, 431 P.2d at 106.

167 State v. Adams, 4 Ariz. App. 298, 419 P.2d 739 (1966). Even if not moot after sentence is served, a conviction cannot be attacked by habeas corpus in the courts of Arizona because of the custody requirement, Garvey v. State *ex rel.* Eyman, 1 Ariz. App. 580, 405 P.2d 832 (1965), or in the federal courts, Carafas v. LaVallee, 391 U.S. 234 (1968). *Carafas* has held federal habeas corpus available to a defendant who has completed serving his sentence, but only if his petition for relief was filed at a time when he was in custody. For 60(c)'s potential in this regard see the discussion of New Mexico's rule 60(b), which is identical to Arizona's 60(c), in Note, *Post-Conviction Relief After Release from Custody: A Federal Message and A New Mexico Remedy*, 9 NAT. RES. J. 85 (1969).

168 102 Ariz. 399, 430 P.2d 419 (1967).

169 *See* text accompanying note 160 *supra*.

170 *See* Note, *Post-Conviction Relief After Release from Custody: A Federal Message and A New Mexico Remedy*, 9 NAT. RES. J. 85, 98 (1969).

171 State v. Churton, 9 Ariz. App. 16, 18 n.4, 448 P.2d 888, 890 n.4 (1968).

172 State v. Adams, 4 Ariz. App. 298, 299, 419 P.2d 739, 740 (1966).

In effect, then, Arizona has created, without express recognition in the decisions, a local post-conviction remedy which parallels the federal "2255 motion":[173] a remedy cognizable in the convicting court rather than in a court of the county where the petitioner is detained.[174] Increased reliance on 60(c) might, therefore, operate in Arizona to distribute more equitably the post-conviction workload which is currently shouldered principally by the Superior Court of Pinal County, where most habeas corpus petitions are filed.[175] Until the viability of 60(c) is more explicitly recognized by the Arizona courts, however, practitioners should continue to rely on habeas corpus in those instances where habeas corpus has clearly been held an appropriate remedy.

PROCEDURE

If no appeal from the conviction has been taken, a motion for relief pursuant to rule 60(c)[176] should be filed in the superior court of the county of conviction. The motion should specify the facts entitling the inmate to relief and, if there has been any delay in filing for relief, should also indicate by affidavit the reason for the delay.[177] The latter requirement flows from rule 60(c)'s "reasonable time" limitation, which in criminal cases will hopefully pose few, if any, problems.[178]

If the conviction to be challenged by a 60(c) motion is pending on appeal,[179] or if it has already been affirmed on appeal,[180] the 60(c) motion should not at the outset be filed with the superior court, because the perfection of an appeal ousts the lower court of jurisdiction over matters

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173 28 U.S.C. § 2255 (1964).

174 *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST- CONVICTION REMEDIES 28 (Tent. Draft 1967) (recommending such an approach).

175 Unlike habeas corpus, which has no time limit, rule 60(c) relief must be sought within a "reasonable time." But, in practice, the time limitation will in most instances probably not be applied to preclude relief. *See* State v. Moreno, 102 Ariz. 399, 430 P.2d 419 (1967) (liberally construing the requirement). Actually, rather than being procedurally narrower than habeas corpus, 60(c) may, in fact, be broader. *Moreno* indicates, for example, that 60(c) relief will not be frustrated by the failure of the defendant to appeal, even though his contention could properly have been raised on direct review. 102 Ariz. at 402, 430 P.2d at 422.

176 With rule 60(c), as with other post-conviction remedies, the Arizona courts are not concerned with labels. The courts will treat a motion as one for relief under 60(c), if that is the proper procedural route, even if it is improperly entitled. State v. Churton, 9 Ariz. App. 16, 448 P.2d 888 (1968).

177 Marquez v. Rapid Harvest Co., 99 Ariz. 363, 366, 409 P.2d 285, 287 (1965) (civil case under rule 60(c)).

178 State v. Moreno, 102 Ariz. 399, 430 P.2d 419 (1967), holding a 13-month delay reasonable, reads the time limitation very liberally where prison inmates are involved, and suggests that a motion will be timely if made within a short while after an indigent is provided with legal assistance. *Moreno* also cites a civil case where a five-year delay was upheld. Austin v. Smith, 312 F.2d 337 (D.C. Cir. 1962). *See* State v. Adams, 4 Ariz. App. 298, 419 P.2d 739 (1967) (six-year filing delay upheld where defendant's claim rested on a decision handed down five years after judgment of conviction).

179 State v. Lopez, 96 Ariz. 169, 393 P.2d 263 (1964).

180 *See* Rogers v. Ogg, 101 Ariz. 161, 416 P.2d 594 (1966); State v. Noriega, 5 Ariz. App. 572, 429 P.2d 459 (1967).

raised by a 60(c) motion.[181] In such cases, the motion should be filed initially in the appellate court, together with an application to remand the case to the lower court. After examining the documents and determining them to be legally sufficient, the appellate court may reinstate the jurisdiction of the superior court for the purpose of ruling on the merits of the motion. But if the motion raises simply a question of law, the appellate court itself can finally dispose of the matter, without the necessity of a remand to superior court.[182]

An unfavorable trial court ruling on a 60(c) motion is appealable both by the state[183] and by the defendant.[184] But it seems unclear at the moment whether a 60(c) motion in a criminal context is appealable as a civil or as a criminal matter.[185]

CONCLUSION

An article of this type necessarily should represent the beginning rather than the end of a venture. Lawyers and law students interested in correctional work must at the outset acquaint themselves with the underpinnings of the post-conviction legal framework. But the concern of the lawyer in a prisoner legal assistance program should be far broader than simple legal mechanics, particularly if the legal clinic is attached to a law school.

The day-to-day exposure to the problems of prisoners should enable the lawyer and law student to reflect on the overall picture of the criminal correction system, to criticize some of its components and to recommend changes in the system and in the statutes which created and perpetuate it. Questions such as the potentials and limits of rehabilitation, the impact of detainers on the correctional process,[186] the efficacy of mandatory penalty statutes,[187] the wisdom of a local legal system that generally releases second offenders unconditionally rather than on parole,[188] and the necessity of a Model Code of Correctional Procedure[189] are typical of the kind that should be asked by concerned members of the legal profession—and written about in the legal journals.

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181 *Cf.* notes 133-137 *supra*, and accompanying text.

182 *E.g.*, State v. Churton, 9 Ariz. App. 16, 448 P.2d 888 (1968).

183 State v. Dixon, 6 Ariz. App. 210, 431 P.2d 105 (1967).

184 State v. Pill, 5 Ariz. App. 277, 425 P.2d 588 (1967).

185 The fact that rule 60(c) is a rule of civil procedure might indicate that 60(c) appeals, even those attacking criminal judgments, should comply with civil appellate procedure. And the fact that habeas corpus appeals are considered civil should buttress that interpretation. Boies v. Anderson, 6 Ariz. App. 563, 435 P.2d 70 (1967). But in State v. Pill, 5 Ariz. App. 277, 425 P.2d 588 (1967), division two of the court of appeals held appealable the denial of a motion to vacate on the ground that it is an order affecting substantial rights within the meaning of the criminal code, ARIZ. REV. STAT. ANN. § 13-1713(2) (1956).

186 Note, *Unconstitutional Uncertainty: A Study of the Use of Detainers*, 1 PROSPECTUS 119 (1968).

187 *E.g.*, ARIZ. REV. STAT. ANN. § 36-1002 (Supp. 1969).

188 ARIZ. REV. STAT. ANN. § 31-252 (1956).

189 F. Cohen, *The Legal Challenge to Corrections: Implications for Manpower and Training* 105 (Joint Comm'n on Correctional Manpower and Training, Consultant's Paper, 1969).