

2016 Appeals for Trial Prosecutors

September 23, 2016
APAAC Training Center
Phoenix, Arizona



State's Appeals

Presented By:

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Distributed By:

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6 IN THE MUNICIPAL COURT OF THE CITY OF PHOENIX
7 COUNTY OF MARICOPA, STATE OF ARIZONA

8 STATE OF ARIZONA,) No. 20139006937
9 Plaintiff,)
10 vs.) STATE'S NOTICE OF APPEAL
11 PAULA WARNER,) NWT: March 14, 2014
12 Defendant.) Courtroom 604 at 8:30 a.m.
13

14 As authorized by A.R.S. § 13-4032, the State of Arizona appeals from
15 the Honorable Kevin Kane's Order granting Defendant Paula Warner's Motion to
16 Suppress Results of Blood Test entered in Courtroom 604 of the Phoenix Municipal
17 Court on February 27, 2014.

18 RESPECTFULLY SUBMITTED this 12th day of March, 2014.

19 PHOENIX CITY PROSECUTOR

20
21 By: _____
22 GARY L. SHUPE
Assistant City Prosecutor

1 Original filed with the Court.

2 Copy of the foregoing delivered
this 12th day of March, 2014, to:

3
4 APPEALS CLERK
5 PHOENIX MUNICIPAL COURT
300 West Washington, 3rd Floor
Phoenix, Arizona 85003

6 Copy of the foregoing mailed
this 12th day of March, 2014, to:

7
8 SAMUEL L. COSTANZO
515 East Carefree Highway, #1092
Phoenix, Arizona 85085
9 Attorney for Defendant

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6 IN THE MUNICIPAL COURT OF THE CITY OF PHOENIX
7 COUNTY OF MARICOPA, STATE OF ARIZONA

8 STATE OF ARIZONA,)	No. 20139006937
)	
9 Plaintiff,)	
)	STATE'S DESIGNATION OF RECORD
10 vs.)	
)	
11 PAULA WARNER,)	NWT: March 14, 2014
)	Courtroom 604 at 8:30 a.m.
12 Defendant.)	
)	

13

14 The State designates the following record on appeal in addition to that
15 contemplated by Arizona Superior Court Rule of Criminal Appellate Procedure 7(c):

- 16 1. The entire contents of the court's file in the above-captioned case,
17 including the court's log of events and all exhibits admitted into evidence;
- 18 2. A transcript of the entire proceedings of the above-captioned case
19 which took place on January 15, 2014 in Courtroom 604 of the Phoenix Municipal
20 Court before the Honorable Kevin Kane.

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RESPECTFULLY SUBMITTED this 12th day of March, 2014.

PHOENIX CITY PROSECUTOR

By: _____
GARY L. SHUPE
Assistant City Prosecutor

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PHOENIX MUNICIPAL COURT
300 West Washington, 3rd Floor
Phoenix, Arizona 85003

Copy of the foregoing mailed
this 12th day of March, 2014, to:

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

Presents

Appeals for Trial Prosecutors

STATE'S APPEALS

August 19, 2016
APAAC Training Center
Phoenix, Arizona

Gary L. Shupe
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I. Preliminary ground rules

Suffered a bad result, now what? You want to appeal! But can you? What's your authority?

A defendant's right to appeal is guaranteed by Art. 2, § 24 of the Arizona Constitution.

But "appeals by the state in criminal matters are not favored and will be entertained only when that right is clearly provided by constitution or statute." *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990). Courts presume, "in the absence of express legislative authority, that the state lacks the ability to appeal in criminal matters." *Dawson*, 164 Ariz. at 280, 792 P.2d at 743.

The State has no constitutional right to appeal; nor did a right to appeal exist under the common law. *State v. Moore*, 48 Ariz. 16, 18, 58 P.2d 752, 752 (1936).

So the State may appeal only as authorized by statute. What, if any, statutes authorize the State to appeal?

A.R.S. § 13-4031 states that any party to a criminal action “may appeal as prescribed by law and in the manner provided by the rules of criminal procedure.” Section 13-4031 offers hope that a right to appeal exists but reinforces the idea that the right is limited to statutory text.

The statute also introduces the concept that compliance with statutory and procedural rules is necessary and implies that the right to appeal could be waived through failure to comply with the applicable rules. Case law echoes this concept: “when an appeal is sought, it must be done within the time and manner provided by law.” *Dawson*, 164 Ariz. at 280, 792 P.2d at 743.

II. A.R.S. § 13-4032: the State as the Appellant.

Section 13-4032 offers specifics. It permits the State to appeal from the following judicial determinations:

1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.
2. An order granting a new trial.
3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
4. An order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim’s request.
5. A sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A.
6. An order granting a motion to suppress the use of evidence.
7. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

Section 13-4032 allows the State to appeal from both record courts (i.e., the superior court) and nonrecord courts (i.e., justice courts or municipal courts). *Litak v. Scott*, 138 Ariz. 599, 601, 676 P.2d 631, 633 (1984).

Note, again, that appellate courts strictly construe Section 13-4032’s terms and will presume that the State lacks the ability to appeal in the absence of clear direction. *State v. Hansen*, 237 Ariz. 61, 64, ¶ 5, 345 P.3d 116, 119 (App. 2015), *rev. denied*.

A. Subsection 13-4032(1): appeal from an order that dismisses all or part of an indictment, information, or complaint.

What may be appealed under subsection 13-4032(1) is fairly straightforward. This subsection grants the State the ability to appeal from orders granting defense motions to dismiss. Think allegations of speedy-trial or preindictment-delay violations, legally insufficient indictments or complaints, vindictive prosecution, prosecutorial misconduct, etc.

Here's a potentially less obvious (or common) basis to appeal an order dismissing an indictment: where the trial court dismisses an indictment on the belief that the indictment had been charged in the wrong venue. *State v. Aussie*, 175 Ariz. 125, 854 P.2d 158 (App. 1993).

Generally, a dismissal that results from a remand to the grand jury for a new determination of probable cause *is not* appealable. Special-action relief must be sought. *State ex rel. Corbin v. Superior Court*, 161 Ariz. 181, 183, 777 P.2d 679, 681 (App. 1988), *vacated on other grounds sub nom. State ex rel. Corbin v. Ybarra*, 161 Ariz. 188, 777 P.2d 686 (1989).

A motion to reconsider an order granting a motion to dismiss is also not appealable. *State v. Berry*, 133 Ariz. 264, 267, 650 P.2d 1246, 1249 (App. 1982). The State can seek reconsideration. But the State must timely appeal the dismissal order. Proceedings related to a motion for reconsideration will not extend the time to file a notice of appeal.

This rule applies to motions to reconsider other rulings as well. *State v. Limon*, 229 Ariz. 22, 23, ¶ 5, 270 P.3d 849, 850 (App. 2011) ("And, contrary to the state's suggestion, the order denying the motion to reconsider is not an appealable order. Section 13-4032 lists seven types of orders or rulings from which the state may appeal, and a ruling on a motion for reconsideration is not among them.").

The State ordinarily does not have right to appeal from an order granting its own motion to dismiss. *Litak v. Scott*, 138 Ariz. 599, 676 P.2d 631 (1984). But the State may appeal from a dismissal order that exceeds what the State sought. *State v. Gilbert*, 172 Ariz. 402, 404, 837 P.2d 1137, 1139 (App. 1991), *rev. denied* (1992) (permitting the State to appeal where the State moved to dismiss without prejudice, which the trial court initially granted but later converted to a dismissal with prejudice).

B. Subsection 13-4032(2): appeal from an order that grants a new trial.

Subsection 13-4032(2) seems self-explanatory and obviously includes an order after judgment granting a defense motion for new trial. *State v. Hickie*, 133 Ariz. 234, 236, 650 P.2d 1216, 1218 (1982).

But what if the court orders a new trial after granting a defense motion for mistrial before a verdict is reached by the jury or court? The State may not appeal in this instance. See *Hansen*, 237 Ariz. at 65, ¶ 7, 345 P.3d at 120.

What if the court orders a new trial after granting a defense motion for mistrial after the jury reaches a verdict but before the court enters judgment? The State is not permitted to appeal in this instance either. *Hansen*, 237 Ariz. at 65, ¶ 8, 345 P.3d at 120.

C. Subsection 13-4032(3)–cross-appeal: when a convicted defendant appeals from a conviction, the State may cross-appeal from an adverse ruling on a question of law.

Subsection 13-4032(3) permits the State to cross-appeal from nonfatal adverse rulings that it ordinarily couldn't appeal under another subsection, like discovery sanctions or evidentiary rulings. The State may also cross-appeal from nonfatal rulings that it had a right to appeal but elected not to appeal. This category could include instances where the court suppressed evidence but the State proceeded to trial in lieu of appealing.

Note, however, that the right to cross-appeal is dependent on the defendant's conviction and appeal. There is no cross-appeal if the defendant does not appeal.

The State probably underutilizes the right to cross-appeal.

D. Subsection 13-4032(4): appeal from an order made after judgment that affects the State's or the victim's substantial rights. The State may appeal an order affecting the victim's substantial rights only with the consent and at the request of the victim.

Under this subsection, the State can appeal, among other things:

- an unauthorized modification to a plea agreement that the trial court had previously accepted. *State v. Corno*, 179 Ariz. 151, 153, 876 P.2d 1186, 1188 (App. 1994); *State v. Rutherford*, 154 Ariz. 486, 487, 744 P.2d 13, 14 (App. 1987);
- the granting of a motion to vacate judgment. See *State v. Netz*, 114 Ariz. 296, 298, 560 P.2d 814, 816 (App. 1977);
- a postjudgment restitution order adversely affecting a victim's substantial rights. See *Hoffman v. Chandler*, 231 Ariz. 362, 365, ¶ 15, 295 P.3d 939, 942 (2013).

If the State appeals or cross-appeals based on a violation of a victim's substantial rights, the State must acknowledge this fact in either the notice of appeal or the opening brief. And Counsel for the State must certify "that the victim has requested the appeal or cross-appeal." Arizona Rule of Criminal Procedure 31.2(d).

E. Subsection 13-4032(5): appeal from an illegal sentence or one that "is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A."

An illegal sentence is one not imposed "in compliance with the mandatory provisions of a sentencing statute." *State v. Vargas-Burgos*, 162 Ariz. 325, 326, 783 P.2d 264, 265 (App. 1989); *State ex rel. McDougall v. Crawford*, 159 Ariz. 339, 341, 767 P.2d 226, 228 (App. 1989). The State can appeal, then, from the trial court's failure to impose a mandatory fine or prison term, or from the failure to order appropriate restitution. And, obviously, the statutory text allows the State to appeal when the sentence imposed is different from the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706(A).

The State may appeal as well from an order refusing to use valid prior convictions to enhance a sentence. *State v. Sands*, 145 Ariz. 269, 276, 700 P.2d 1369, 1376 (App. 1985); *Crawford*, 159 Ariz. at 341, 767 P.2d at 228. But an order striking an allegation of a prior conviction is not an appealable order. *Crawford*, 159 Ariz. at 340-41, 767 P.2d at 227-28.

The State's appeal of an illegally lenient sentence is not rendered moot merely because the defendant serves the sentence before the appeal is concluded. *Scheerer v. Munger*, 230 Ariz. 137, 139, ¶ 8, 281 P.3d 491, 493 (App. 2012). To avoid this situation, however, make sure that the defendant's sentence is stayed pending appeal.

"[T]he trial court's failure to impose a legal sentence is one of those rare situations from which the state can seek review even if it failed to object in the trial court." *Dawson*, 164 Ariz. at 281, 792 P.2d at 744.

Note: the State can also move to modify sentence under Arizona Rule of Criminal Procedure 24.3 ("The court may correct any unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and sentence but before the defendant's appeal, if any, is perfected."). In fact, the Supreme Court in *Dawson* "strongly urge[d]" the State to ask the trial court to modify an illegal sentence under Rule 24.3 before appealing. Presumably, this gives the trial court an opportunity to correct its error and reduces the case load of the court of appeals.

An order denying a motion to modify an illegal sentence is apparently appealable. ("In noncapital cases, the party appealing a final decision under [Rule 24.3] shall file the notice of appeal with the clerk of the trial court within 20 days after entry of the decision in superior court, or within 14 calendar days after entry of the decision in a court of limited jurisdiction. In capital cases, the court, after denying modification of a sentence of death, shall order the clerk to file a notice of appeal from the denial." Rule 24.3.). To be safe, file a timely notice of appeal challenging the illegal sentencing order. An amended or additional notice of appeal challenging any denial of the motion to modify can be filed later.

F. Subsection 13-4032(6): appeal from an order that grants a motion to suppress evidence.

Though the language of subsection 13-4032(6) is arguably broad enough to permit an appeal from *any* order suppressing evidence, that is not how the courts have interpreted it. Instead, the courts have repeatedly (and largely) held that subsection 13-4032(6) allows the State to appeal pretrial suppression orders questioning whether the State lawfully acquired evidence. *State v. Lelevier*, 116 Ariz. 37, 38, 567 P.2d 783, 784 (1977) (citing Arizona Rules of Criminal Procedure 16.2(a) and (b) and defining a motion to suppress as one that “challenges only the constitutionality of the obtaining of evidence by the state and [] is made before trial begins”); *State v. Million*, 120 Ariz. 10, 13, 583 P.2d 897, 900 (1978) (interpreting the predecessor to subsection 13-4032(6) as providing “the State a right to appeal from a pretrial suppression order”); *State v. Bejarano*, 219 Ariz. 518, 522, ¶ 14, 200 P.3d 1015, 1019 (App. 2008) (finding that the State was unable to appeal under subsection 13-4032(6) the trial court’s order precluding a key State witness as a sanction for a discovery violation); *State v. Roper*, 225 Ariz. 273, 273, ¶ 1, 236 P.3d 1220, 1220 (App. 2010), *rev. denied* (2011) (following the “compelling” *Bejarano* decision and holding that the State may not “appeal from an order precluding evidence as a disclosure sanction in a criminal case”).

You should be aware that, in *State v. Rodriguez*, 160 Ariz. 381, 382, 773 P.2d 486, 487 (App. 1989), the court of appeals held that “[t]he state’s right to appeal under [A.R.S. § 13-4032(6)] is not limited to the suppression of illegally-obtained evidence.” The *Rodriguez* Court accepted a State’s appeal in a case involving a pretrial evidentiary ruling—the trial court’s order precluding the State from admitting transcribed testimony from a prior trial. But *Rodriguez* is arguably contrary to the Supreme Court’s *Lelevier* opinion. And the court of appeals in *Bejarano* and *Roper* later criticized and declined to follow *Rodriguez*.

For prosecutors this means that a suppression order is appealable if the trial court finds that the State or one of its agents unlawfully acquired evidence. Examples include adverse rulings on motions to suppress alleging violations of either the federal or state constitutions. For instance, motions claiming that officers unlawfully seized or searched a suspect would fall in this case, as would motions asserting that officers failed to read the *Miranda* warnings before conducting custodial interrogation.

Motions in this class could be captioned as motions to suppress, preclude, or exclude. However captioned, the motions must challenge, in accordance with Rule 16.2, the lawfulness of the State’s use or acquisition of certain evidence.

Suppression orders premised on grounds other than whether the State’s evidence was lawfully acquired are not appealable. Orders of this type include, for example, rulings on pretrial or midtrial evidentiary objections, or rulings precluding evidence as discovery sanctions.

G. Subsection 13-4032(7): appeal from a judgment of acquittal for one or more charged offenses that is entered after a guilty verdict.

Subsection 13-4032(7) provides a narrow and, thankfully, seldom needed basis for appeal: the granting of a motion for judgment of acquittal made after the verdict. Trial courts should not be granting motions for judgment of acquittal unless "there is no substantial evidence to warrant a conviction." Arizona Rule of Criminal Procedure 20(a) and (b); *State v. West*, 226 Ariz. 559, 561, ¶ 8, 250 P.3d 1188, 1190 (2011).

Reminder: the State may not appeal a motion for judgment of acquittal made *before* the verdict. *Rolph v. City Court of City of Mesa*, 127 Ariz. 155, 158, 618 P.2d 1081, 1084 (1980); *State v. Sabalos*, 178 Ariz. 420, 421, 874 P.2d 977, 978 (App. 1994), *rev. denied*. The prohibition against double jeopardy bars further action. This is true even if the trial court's decision is "egregious." *Rolph*, 127 Ariz. at 158, 618 P.2d at 1084.

III. Procedure

If you can appeal, how do you go about it?

A. Do you need to dismiss the case before appealing?

If the trial court suppressed evidence, you need to move to dismiss the case before appealing. *Lelevier*, 116 Ariz. at 38-39, 567 P.2d at 784-85; *Million*, 120 Ariz. at 14-15, 583 P.2d at 901-02.

This might seem counterintuitive, but the Supreme Court has held that the State should dismiss its case to pursue an appeal when challenging the trial court's suppression of evidence. The purpose for doing so, according to the Supreme Court, is to avoid violating the defendant's right to a speedy trial. *Lelevier*, 116 Ariz. at 38-39, 567 P.2d at 784-85.

To preserve the State's right to appeal, the Supreme Court has determined that Rule 8 time doesn't run during an appeal. *State ex rel. McDougall v. Gerber*, 159 Ariz. 241, 242, 766 P.2d 593, 594 (1988).

For the same reason, the court of appeals found that the statute of limitations is tolled during an appeal. *Lee v. Superior Court*, 173 Ariz. 120, 124, 840 P.2d 296, 300 (App. 1992).

If the trial court granted a new trial, use the same procedure to appeal that is used when the court suppresses evidence. Dismiss to appeal the trial court's ruling. *State v. Fischer*, 238 Ariz. 309, 312, 313, ¶¶ 9-10, 15, 360 P.3d 105, 108, 109 (App. 2015), *review granted in part* (Mar. 15, 2016) (review appears to have been granted on another issue).

Depending on the practice of your particular court, the motion to dismiss could be oral or written. If written, the reason for dismissal when evidence is suppressed is usually the State's inability to proceed without the suppressed evidence. When a new trial is ordered you'll probably need to be more transparent and acknowledge that you're dismissing to appeal.

It's often wise to cite *State v. Million* (when evidence is suppressed) or *State v. Fischer* (when a new trial is ordered) as authority for dismissing to appeal, unless pragmatic concerns dictate otherwise.

None of the other instances where the State can appeal require the State to first dismiss the case. That's because cases in all other instances will be in a postjudgment phase. The right to a speedy trial and the statute of limitations will therefore not be a concern.

B. Jurisdiction

It's good practice to include in your brief the basis for the appellate court's jurisdiction. (A statement about jurisdiction is required in briefs filed in the court of appeals. Rule 31.12(c).) As noted above, section 13-4032 gives appellate courts jurisdiction to hear State's appeals in seven delineated areas. In addition, A.R.S. § 12-120.21 provides the court of appeals with "[a]ppellate jurisdiction in all actions and proceedings originating in or permitted by law to be appealed from the superior court, except criminal actions involving crimes for which a sentence of death has actually been imposed."

C. Applicable rules

For appeals taken from the superior court, the Arizona Rules of Criminal Procedure 31.1 *et seq.* establish the process for criminal appeals.

For appeals taken to the superior court when a record exists, the Arizona Superior Court Rules of Appellate Procedure—Criminal generally govern. But in situations where no specific SCRAP applies, SCRAP 1(b) directs parties to follow the appropriate procedure under Rule 31.

In lower-court appeals when no record exists (a presumably rare scenario), follow Arizona Rules of Criminal Procedure Rule 30.1 *et seq.*

D. Notice of Appeal

To initiate an appeal, parties must file a notice of appeal or of cross-appeal.

1. Time for filing

From the superior court: once a case is prepared for appeal, you must file a notice of appeal within twenty days of the order, judgment, sentence, or ruling to be

challenged. Rule 31.3. The State's notice of cross-appeal must be filed within twenty days of receiving the defendant's notice of appeal. Rule 31.3(a).

To the superior court: the notice of appeal must be filed within fourteen days of the order, judgment, sentence, or ruling to be challenged. SCRAP 4(a). The SCRAP Criminal do not address cross-appeals. Look then to Rule 31.3(a) and file a notice of cross-appeal within twenty days of receiving the defendant's notice of appeal.

If the ruling or order to be appealed from is mailed to the parties, you have an additional five days to file the notice of appeal. *State v. Rabun*, 162 Ariz. 261, 263, 782 P.2d 737, 739 (1989).

An untimely notice of appeal or cross-appeal is jurisdictionally barred. *Dawson*, 164 Ariz. at 280, 792 P.2d at 743. Don't file an untimely notice! Know, however, that defendants who satisfy Rule 32.1(f) may file a notice of delayed appeal and still proceed.

2. Contents of the appeal or cross-appeal

Notices of appeal or cross-appeal must:

- be written;
- specify the order, judgment, sentence, or ruling appealed from;
- be signed by a prosecutor;
- acknowledge, when applicable, that the State appeals or cross-appeals based of a violation of a victim's substantial rights; and,
- certify, when applicable, "that the victim has requested the appeal or cross-appeal."

See Rule 31.2(d); SCRAP 3(a) and (b).

Rule 31.2(e) suggests that the notice also include the name and address of the defendant and any codefendant along with the name and address of any defense counsel.

E. The record for appeals taken from the superior court.

The record on appeal shall consist of:

- a certified transcript;
- all documents, papers, books and photographs *introduced into evidence*;
- all pleadings and documents in the file (other than subpoenas and praecipes not specifically designated); and,
- if allowed by the court of appeals, an electronic recording of the proceeding.

Rule 31.8(a)(1) (emphasis added).

An appellant may file a designation of record adding, among other things, specific subpoenas and praecipes. In a designation of record, a party may also ask that specified documents, papers, books or photographs be deleted from the record on appeal as unnecessary. Rule 31.8(a)(2)(i). Appellants must file designations of record within five days of the filing of the notice of appeal.

Any exhibit not admitted into evidence, "including the excised portion, if any, of a pre-sentence, diagnostic[,] or mental health report may be added to the record on appeal only by order of the appellate court." Presumably, such an order could be issued *sua sponte* by the court of appeals or in response to a motion by a party. Rules 31.8(a)(2)(iii) and 31.9(d).

Practice tip: if you are appealing or cross-appealing the trial court's preclusion of any documents, papers, books or photographs, move to admit the precluded items into evidence as part of your offer of proof. This ensures that the items are part of the record (because exhibits that are offered but not admitted are sometimes not retained by the court). It also prevents the need to file a motion with the court of appeals asking to add the nonadmitted items to the record on appeal, a motion that the court doesn't have to grant.

A certified transcript is one prepared by an authorized transcriber, which is "a certified court reporter or a transcriber under contract with an Arizona court." Rule 31.8(b)(1). The record on appeal in all cases except where the death penalty has been imposed includes a certified transcript composed of:

- any voluntariness or suppression hearing;
- the trial (omitting the record of *voir dire* and counsels' opening and closing arguments unless specifically identified in a party's designation of record);
- the entry of judgment and sentence;
- any probation-violation proceeding; and,
- any aggravation or mitigation hearing.

Rule 31.8(b)(2).

A designation of record can be used to reduce or augment the transcript from that automatically prepared under Rule 31.8. See Rule 31.8(b)(4).

F. The record for appeals taken to the superior court.

For lower-court appeals, the record consists of:

- (1) The notice of appeal;
- (2) The docket or list of events;
- (3) Documentation or record of payment of a fine, restitution, or posting of bond;
- (4) The charging document and any amendments;
- (5) Disposition or judgment or sentence; and
- (6) The order, judgment, or ruling that is the subject of the appeal.

Unless otherwise designated by a party, the record shall also include:

- (7) Any written motions, responses, and replies;
- (8) Any exhibits (admitted or not);
- (9) The recording or certified transcript of the trial, as the Superior Court may require (except that *voir dire*, opening and closing argument, and jury instructions shall not be included unless designated by a party);

(10) If designated for inclusion by a party, oral argument on motions, voluntariness, or suppression hearings; aggravation or mitigation hearings; probation violation proceedings; and the entry of judgment and sentence;

(11) Any other matter designated by a party.

SCRAP 7(c).

Refer also the applicable Local Rules for your particular county, if they exist. Rule 9.4(b) of the Local Rules for Maricopa County Superior Court, for instance, requires a transcript if the record of the proceedings is ninety minutes or more. Shorter records may consist of an "audio, video, digital, transcription, or other method of recording as approved by the Supreme Court." When the record is a audio recording instead of a transcript, parties must still cite to the record in some "reasonable and understandable fashion." *Jordan v. McClennen*, 232 Ariz. 572, 575, ¶ 12, 307 P.3d 999, 1002 (App. 2013).

Note that the record on appeal in lower-court appeals does not automatically include *voir dire*, opening and closing arguments, and jury instructions, oral argument on motions, suppression hearings, aggravation or mitigation hearings, probation-violation proceedings, or the entry of judgment and sentence. SCRAP 7(c)(9) and (10). The same is true for "determinations of release conditions, notices of appearance, discovery disclosures, notices of defenses, subpoenas, notices of pretrial or trial settings[,] MVD abstracts or other agency advisories, or general correspondence." SCRAP 7(f). These items, if desired, must be included in a designation of record. SCRAP 7(d).

G. Miscellaneous thoughts about the record

As you can see, the likely record on appeal is largely prepared automatically by the rules of procedure. But you are responsible for ensuring that everything you need for the record on appeal is designated if not automatically included. Be careful about what you choose not to designate. You don't want to lose the appeal because you failed to designate a portion of the record that you knew was irrelevant. The appellate court, which doesn't possess your knowledge about the record, will likely presume that the missing record is relevant and supportive of the trial court:

It is within the [Appellant]'s control as to what the record on appeal will contain, and it is the [Appellant]'s duty to prepare the record in such a manner as to enable an appellate court to pass upon the questions sought to be raised in the appeal. Where matters are not included in the record on appeal, the missing portion of the record will be presumed to support the decision of the trial court. An appellate court will not speculate about the contents of anything not in the appellate record. In the absence of a record to the contrary, we must presume that the trial court acted properly

State v. Rivera, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990) (internal citations omitted).

The appellant, unless indigent, pays for the costs associated with preparing the record and certified transcript (an original and two copies). Rule 31.8(d)(3) and (e).

H. Appellant's briefs

1. Time for filing

For appeals from the superior court, the deadline for the Appellant's opening brief is triggered by notice from the clerk of the court of appeals stating that the superior court has completed the record and filed it with the court of appeals. The Appellant's opening brief must be filed within forty days after the mailing of this notice. Rule 31.13(a) and 31.10. If you wish to file a reply brief, you must do so within twenty days of receiving the Appellee's answering brief. Rule 31.13(a).

For lower-court appeals, the deadline for the filing of the Appellant's opening brief is essentially no later than seventy-four days from the ruling of the trial court that you're appealing. SCRAP 8(a)(2) pegs the filing deadline at sixty days from the deadline to file the notice of appeal, which is fourteen days after the adverse decision being appealed.

2. Form, length, and contents

Rule 31.13 and 31.12 specify the form requirements for appellate briefs in appeals from the superior court. Be sure that you and your secretary are aware of them. An opening brief, including all text and footnotes, is limited to 14,000 words—roughly fifty pages, if using a proportionately spaced typeface of fourteen point (i.e., Times New Roman, 14 pt.). Rule 31.13(b)(1) and (2). A word limit for a reply brief is half that of an opening brief, or 7000 words. *Id.*

For appeals from the superior court, the Appellant's opening brief shall contain:

- a table of contents, with page references;
- a table of authorities, arranged alphabetically and separately categorizing the cases, statutes, and other authorities cited, with page references;
- a statement of issues ("The statement of an issue presented for review will be deemed to include every subsidiary issue fairly comprised therein.");
- a statement of case, which gives the basis for the court of appeals' jurisdiction and describes the nature of the case and the procedural history;
- a statement of relevant facts with citations to the record. The statements of facts and of case may be combined;
- a statement of law or argument section "which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on";
 - for each issue, the standard of review on appeal should be included;
- a short conclusion "stating the precise relief sought"; and,
- an appendix, if one is needed.

Rule 31.13(c).

SCRAP 8(a) establishes the form, length, and content requirements for lower-court appellate memoranda, though the Local Rules of your superior court may also be applicable. Lower-court appellate memoranda are subject to fewer requirements than appellate briefs filed in the court of appeals. In the superior court, memoranda need only include "a short statement of the facts with reference to the record, a concise argument setting forth the legal issues, presented with citation of authority, and a conclusion with stating the precise remedy on appeal." SCRAP 8(a)(3). Lower-court opening and answering memoranda are shorter too, being limited to fifteen pages. SCRAP 8(a)(4). A reply memorandum may only be filed with the permission of the superior court. SCRAP 8(a)(2).

I. Extensions of time for filing

If other matters prevent you from finishing your brief by the initial deadline, the procedural rules permit you to seek additional time from an appellate court. But the courts handle the requests differently.

Division Two requires parties to "request an extension by motion that sets forth good cause for granting it." See <https://www.appeals2.az.gov/courtPolicies.cfm>; Rule 31.13(d). The motion must state the opposing party's position on your request for extension.

Division One, on the other hand, "routinely grants a filer one 30-day extension of time for the filing of an opening or answering brief, and one 20-day extension of time for the filing of a reply brief, without requiring a showing of any cause." See <http://www.azcourts.gov/coa1/Policies>. To obtain a first extension, parties email a request to CRextension@appeals.az.gov; copy opposing counsel on the request. Division One grants additional requests for extensions "only upon a motion showing actual and substantial good cause." *Id.* Division One's website lists a variety of factors the court considers when deciding whether to grant additional extensions. *Id.*

SCRAP 8(b) authorizes parties to seek additional time to complete their memoranda upon a showing of "good cause." But motions for extension are filed in the trial court, not the appellate court, and the opposing party is not permitted to respond without permission from the trial court.

J. Oral-argument requests

A party may seek oral argument in the court of appeals by filing a separate request no later than ten days after the reply brief is filed. The court grants argument in its discretion. Rule 31.14.

Requests for oral argument in lower-court appeals need to be made in the caption of the appellate memorandum (i.e., Oral Argument Requested). If requested, the superior court must grant oral argument. SCRAP 11(a).

K. Motions to dismiss an appeal

Should you decide for some reason to discontinue your appeal, you can move to dismiss it in the court of appeals by filing a motion to dismiss that complies with Rule 31.15(a)(2). For lower-court appeals, file a motion to dismiss under SCRAP 8(c).

L. Authority of the appellate court to resolve the appeal

Both 31.13(c) and SCRAP 8(a)(3) advise parties to precisely state in their conclusion the relief they seek. So give serious thought to the relief you desire. Not only will it help you frame your issues and thus your brief, it will force you to consider what remedy is appropriate for the harm suffered.

The court of appeals, under Rule 31.17(a) and (b), and the superior court, under SCRAP 12(a) and (b), possess generally broad powers to grant relief. These appellate court may reverse, affirm, or modify the trial court's ruling as they deem necessary. But they may also issue ancillary orders "in aid of the proceedings" as they deem necessary.