2016 Appeals for Trial Prosecutors

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Special Actions

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Special Actions

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Once upon a time,

A.R.S. § 13-4032

An appeal may be taken by the state from:

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.

Limits on appellate jurisdiction

Again, once upon a time,

"Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule."

Ariz. R. Spec. Act. 1(a).

Kinds of special actions

Special action:

- Interlocutory appeal – what we are talking about today

Statutory special actions:

- For example, A.R.S. § 13-752: intellectual disability determination in a capital case. Court of Appeals must take jurisdiction and decide the special action.

Appeal? or Special Action?

3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.

Appeal? or Special Action?

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.

Illegal sentence? Or just incorrect?

Generally, a sentence is illegal if it is "one that is outside the statutory range." *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991); *see also State ex rel. McDougall v. Crawford*, 159 Ariz. 339, 341, 767 P.2d 226, 228 (App. 1989) (sentence illegal if in violation of statutory mandates); *State v. Vargas-Burgos*, 162 Ariz. 325, 326, 783 P.2d 264, 265 (App. 1989) (sentence illegal if not in compliance with mandatory provisions of statute); *State v. Suniga*, 145 Ariz. 389, 393, 701 P.2d 1197, 1201 (App. 1985) (sentence unlawful if not within statutory provisions).

Clear as mud?

See *State v. Bernini*, 230 Ariz. 223, 225, ¶¶ 4-5, 282 P.3d 424, 426 (App. 2012):

But we ultimately need not resolve that question. "[T]he availability of an appeal does not foreclose the exercise of this court's discretion to accept jurisdiction." That the state's remedy by appeal is not "equally plain" compared to its remedy by special action justifies our discretionary decision to accept jurisdiction here. Further, the question presented here is purely legal, and the state asserts without contradiction by Lopez that "this issue has arisen at least twice in the last several months." Accordingly, in our discretion, we accept jurisdiction of the state's special action.

Appeal? or Special Action?

6. An order granting a motion to suppress the use of evidence.

PRECLUSION VS. SUPPRESSION:

State v. Bejarano, 219 Ariz. 518, 519, 200 P.3d 1015, 1016 (App. 2008).

- Suppression – constitutional violation
- Preclusion – other violation

Differences between Appeals and Special Actions

	Appeal	Special Action
Issues	Only those enumerated in § 13-4032	Any issue not in the statute
Jurisdiction	Mandatory	Highly discretionary
Record	Entire record automatically sent up	Limited record provided by parties
Rules	Rules of Criminal Procedure	Special Action Rules, ARCAP
Timeframe	Long	Short

Special Action Jurisdiction

"Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal."

Ariz. R. Spec. Act. 1(a).

Special Action Jurisdiction

- extraordinary relief and highly discretionary. *McKaney v. Foreman*, 209 Ariz. 268, 275, ¶ 35, 100 P.3d 18, 25 (2004).
- appropriate where there is no "equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Sp. Act. 1(a); *State ex rel. McDougall v. Strohson*, 190 Ariz. 120, 121, 945 P.2d 1251, 1252 (1997).
- appropriate "in cases involving a matter of first impression, statewide significance, or pure questions of law." *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 270-71, ¶ 9, 159 P.3d 578, 580-81 (App. 2007) (citations omitted).

Special Action Jurisdiction

- appellate courts "routinely decline[] to exercise special action jurisdiction to review denials of motions to suppress, and that practice will continue." *Rodriguez v. Arellano*, 194 Ariz. 211, 213, ¶ 4, 979 P.2d 539, 541 (App. 1999)
- "A remedy does not become inadequate merely because more time would transpire by pursuing a conventional action." *Neary v. Frantz*, 141 Ariz. 171, 177, 685 P.2d 1323, 1329 (App. 1984).
- Neither does the expense and delay of a trial and appeal justify special action jurisdiction. *Armstrong v. City Court of City of Scottsdale*, 118 Ariz. 593, 594, 578 P.2d 1022, 1023 (App. 1978).

Special Action Jurisdiction

- appropriate when lower courts, lacking appellate guidance, have rendered inconsistent judgments. *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, 585, ¶ 8, 30 P.3d 649, 652 (App. 2001)

So, how special is your action?

Brand new statute?

Recurring issue?

Inconsistent trial court orders?

Statewide importance?

State vs. Defense special actions

When is jurisdiction appropriate for State?

- Any time we can't appeal.

When is jurisdiction appropriate for defense?

- Only a few times - grand jury, privilege, double jeopardy, Rule 10.2.

When?

State ex rel. McDougall v. Tvedt, 163 Ariz. 281, 283, 787 P.2d 1077, 1079 (App. 1989): no time limit, just laches.

State ex rel. Neely v. Rodriguez, 165 Ariz. 74, 78, 796 P.2d 876, 880 (1990): if an appeal of the order is time-barred, you cannot use special action to get review.

Where?

Rule 4: next court up

Rule 7(b): if you skip a court, you better have a good reason.

How?

File a petition and an appendix.

Rule 7(e):

The petition shall consist of a single document. It shall include a **jurisdictional statement**, a **statement of the issues**, a **statement of the facts** material to a consideration of the issues presented, and an **argument** containing the petitioners' contentions with respect to the issues presented, and the reasons therefor, with **citations to the authorities**, statutes and appropriate **references to the record**. A **copy of the decision** from which the petition is being taken shall be attached to the petition. All references to the record shall be supported by **an appendix of documents** in the record before the trial court that are necessary for a determination of the issues raised by the petition.

Parties

Rule 2(a)(1):

The judge is the respondent, the other party (if we are filing, the defendant) is the real party in interest.

State v. Judge, Respondent, and Defendant, Real Party in Interest.

PARTY AGGRIEVED BELOW,

Petitioner

v.

Hon. [name], a Judge of the Superior Court of the State of Arizona, in and for the County of [name],

Respondent,

and

PREVAILING PARTY BELOW,

Real Party in Interest.

Does the respondent judge respond?

Hurles v. Superior Court, 174 Ariz. 331, 849 P.2d 1 (App. 1993)

Issues Raised in a Special Action

The only questions that may be raised in a special action are:

(a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or

(b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or

(c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Ariz. R. Spec. Act. 3.

Appendix

The court only has what you give it.

- Motions
- Transcripts
- Anything else before the court necessary to tell the story

You cannot prove an abuse of discretion with an incomplete record!

What next?

The Court of Appeals will set a briefing schedule.
Unless they don't.

Differences between Division One and Division Two.

Do you need a stay?

- imminent deadline?
- trial date around the corner?
- jury empaneled?

Stay of Proceedings

Rule 5:

"The court in a special action may grant an interlocutory stay . . . in the same manner and subject to the same limitations as temporary restraining orders and preliminary injunctions are granted under Rule 65 of the Rules of Civil Procedure."

Criteria for a stay:

1. strong likelihood of success on merits
2. possibility of irreparable injury
3. balance of hardships weigh in Petitioner's favor
4. public policy favors the requested relief

Shoen v. Shoen, 167 Ariz. 58, 804 P.2d 787 (App. 1990)

Stay of Proceedings

- Ask the trial court first.
- File motion to stay in appellate court
- Arrange telephonic conference with court and opposing counsel (follow Court's directions)

What about an emergency?

You're in trial. The jury is sworn, so jeopardy has attached.

You need a stay.

But you can't get transcripts. What do you do?

SOLUTION:

1) File "bare bones" petition, explaining the urgency.
2) Attach affidavit(s) signed by prosecutor detailing facts and circumstances.
3) Avow to file transcript(s) as soon as available.
4) Make a REALLY convincing argument for the stay.

Response to Petition

Jurisdictional Statement:

- contradict claim of "no remedy by appeal": A.R.S. § 13-4033
- rebut "special" factors

Appendix:

- include relevant items not supplied by Petitioner

Further review: Rule 8

(a) A decision of a Superior Court in a special action shall be reviewed by appeal where there is an equally plain, speedy, and adequate remedy by that means. Procedure for appeal shall be as prescribed by the applicable rules, except that on application of either party, for cause shown at any time after filing of notice of appeal, the court in which the appeal is pending may waive or order an acceleration of any or all appeal procedures. Where there is no equally plain, speedy, and adequate remedy by appeal, a judgment in a special action in a Superior Court may be reviewed by a special action directed against the original defendants.

(b) In a civil matter, grant or denial of special action relief by the Court of Appeals, including a refusal to take jurisdiction in the case, shall be reviewed by the Supreme Court only upon petition for review pursuant to Rule 23, Rules of Civil Appellate Procedure.

(c) If a special action seeks relief in a criminal case, review of the decision of the Court of Appeals by the Supreme Court shall be by way of a petition for review pursuant to Rule 31.19, Arizona Rules of Criminal Procedure. No court fees may be assessed for filing such a petition.

(d) A party seeking a stay or expedited processing of the petition for review may file a motion in the Supreme Court.

(e) Any petition for review filed in accordance with rule 8(b) or (c) should be captioned as follows: "Petition for Review of a Special Action Decision of the Court of Appeals."