

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Christopher A. Simcox PETITIONER  
(Your Name)

VS.

ORIGINAL

State of Arizona Et al RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a ~~writ of certiorari~~ without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Maricopa County Superior Court Arizona Court of Appeals  
Arizona Supreme Court

Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is not attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: \_\_\_\_\_, or \_\_\_\_\_

a copy of the order of appointment is appended.

Christopher A. Simcox

(Signature)

**AFFIDAVIT OR DECLARATION  
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Christopher A. Simcox, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

| <b>Income source</b>   | <b>Average monthly amount during the past 12 months</b> |               | <b>Amount expected next month</b> |               |
|--|---|---------------|-----------------------------------|---------------|
|  | <b>You</b>  | <b>Spouse</b> | <b>You</b>                        | <b>Spouse</b> |
| Employment   | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Self-employment  | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Income from real property<br>(such as rental income)                 | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Interest and dividends   | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Gifts  | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Alimony  | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Child Support  | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Retirement (such as social security, pensions, annuities, insurance) | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Disability (such as social security, insurance payments)             | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Unemployment payments  | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Public-assistance<br>(such as welfare)                               | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| Other (specify): _____   | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |
| <b>Total monthly income:</b>   | \$ <u>0</u>   | \$ _____      | \$ _____                          | \$ _____      |

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

| <b>Employer</b> | <b>Address</b> | <b>Dates of Employment</b> | <b>Gross monthly pay</b> |
|-----------------|----------------|----------------------------|--------------------------|
| N/A             |                |                            | \$                       |
|                 |                |                            | \$                       |
|                 |                |                            | \$                       |

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

| <b>Employer</b> | <b>Address</b> | <b>Dates of Employment</b> | <b>Gross monthly pay</b> |
|-----------------|----------------|----------------------------|--------------------------|
| N/A             |                |                            | \$                       |
|                 |                |                            | \$                       |
|                 |                |                            | \$                       |

4. How much cash do you and your spouse have? \$ 0  
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| <b>Type of account (e.g., checking or savings)</b> | <b>Amount you have</b> | <b>Amount your spouse has</b> |
|--|------------------------|-------------------------------|
| N/A  | \$                     | \$                            |
|  | \$                     | \$                            |
|  | \$                     | \$                            |

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home  
Value \_\_\_\_\_

Other real estate  
Value \_\_\_\_\_

Motor Vehicle #1  
Year, make & model \_\_\_\_\_  
Value \_\_\_\_\_

Motor Vehicle #2  
Year, make & model \_\_\_\_\_  
Value \_\_\_\_\_

Other assets  
Description \_\_\_\_\_  
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

| <b>Person owing you or your spouse money</b> | <b>Amount owed to you</b> | <b>Amount owed to your spouse</b> |
|--|---------------------------|-----------------------------------|
| <u>N/A</u>                                   | \$ _____                  | \$ _____                          |
| _____  | \$ _____                  | \$ _____                          |
| _____  | \$ _____                  | \$ _____                          |

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

| <b>Name</b> | <b>Relationship</b> | <b>Age</b> |
|-------------|---------------------|------------|
| <u>N/A</u>  | _____               | _____      |
| _____       | _____               | _____      |
| _____       | _____               | _____      |

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

|  | <b>You</b>  | <b>Your spouse</b> |
|--|-------------|--------------------|
| Rent or home-mortgage payment<br>(include lot rented for mobile home)                    | \$ <u>0</u> | \$ _____           |
| Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No |             |                    |
| Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No |             |                    |
| Utilities (electricity, heating fuel,<br>water, sewer, and telephone)                    | \$ <u>0</u> | \$ _____           |
| Home maintenance (repairs and upkeep)  | \$ <u>0</u> | \$ _____           |
| Food   | \$ <u>0</u> | \$ _____           |
| Clothing   | \$ <u>0</u> | \$ _____           |
| Laundry and dry-cleaning   | \$ <u>0</u> | \$ _____           |
| Medical and dental expenses  | \$ <u>0</u> | \$ _____           |

|   | <b>You</b>         | <b>Your spouse</b> |
|---|--------------------|--------------------|
| Transportation (not including motor vehicle payments)                                       | \$ <u>0</u>        | \$ _____           |
| Recreation, entertainment, newspapers, magazines, etc.                                      | \$ <u>0</u>        | \$ _____           |
| Insurance (not deducted from wages or included in mortgage payments)                        |                    |                    |
| Homeowner's or renter's   | \$ <u>0</u>        | \$ _____           |
| Life  | \$ <u>0</u>        | \$ _____           |
| Health  | \$ <u>0</u>        | \$ _____           |
| Motor Vehicle   | \$ <u>0</u>        | \$ _____           |
| Other: _____  | \$ <u>0</u>        | \$ _____           |
| Taxes (not deducted from wages or included in mortgage payments)                            |                    |                    |
| (specify): _____  | \$ <u>0</u>        | \$ _____           |
| Installment payments  |                    |                    |
| Motor Vehicle   | \$ <u>0</u>        | \$ _____           |
| Credit card(s)  | \$ <u>0</u>        | \$ _____           |
| Department store(s)   | \$ <u>0</u>        | \$ _____           |
| Other: _____  | \$ <u>0</u>        | \$ _____           |
| Alimony, maintenance, and support paid to others  | \$ <u>0</u>        | \$ _____           |
| Regular expenses for operation of business, profession, or farm (attach detailed statement) | \$ <u>0</u>        | \$ _____           |
| Other (specify): _____  | \$ <u>0</u>        | \$ _____           |
| <b>Total monthly expenses:</b>  | <b>\$ <u>0</u></b> | <b>\$ _____</b>    |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes  No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form?  Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 1, 2021

C. Simeos  
(Signature)

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

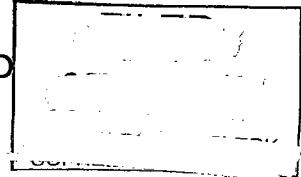
Christopher A. Simcox  
(Your Name)

PETITIONER

vs.

State of Arizona Et al — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO



Arizona Supreme Court Arizona Court of Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Christopher A. Simcox #311769  
(Your Name)

ADOC Lewis Rast Max S. Hwy 85  
(Address)

Buckeye, AZ 85326  
(City, State, Zip Code)

N/A  
(Phone Number)

**QUESTION(S) PRESENTED**

Is a pro se defendant guaranteed a due process right of advisory counsel through the entirety of trial including sentencing phase?

Can the state of Arizona deny a pro se defendant advisory counsel during sentencing phase of trial?

Should pro se defendant be granted a new sentencing hearing if he was without advisory counsel during sentencing hearing of trial process?

## LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Judge Jose S. Padilla - Superior Court Maricopa County

Judge Eppich

Judge Espinosa      → Arizona Court of Appeals Division Two

Judge Eckerstrom

Amanda Parker - Maricopa County Attorney's Office

## RELATED CASES

Petitioner has no access to case law.

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## Decision of State Trial Court

~~Petitioner~~ Petitioner never received a copy of the trial courts decision, likely due to continued movement between state correctional facilities.

Decision rendered by:

Hon. Jose Padilla - ~~Judge~~ Maricopa Superior Court  
CR 2013 428563 001 DT

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is  
www.appeals2.az.gov/APL2 New Docs1/COA/882/3595895.pdf  
 reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the Maricopa County Superior Court court appears at Appendix C to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_A\_\_\_\_\_.  
\_\_\_\_\_

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was 7-8-21.  
A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: 7-8-21, and a copy of the order denying rehearing appears at Appendix A.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_A\_\_\_\_\_.  
\_\_\_\_\_

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## TABLE OF AUTHORITIES CITED

| CASES  | PAGE NUMBER |
|--|-------------|
| Petitioner has no access to case law research. | 1           |

STATUTES AND RULES

OTHER

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

U.S. Constitution, Fourth Amendment, due process.

Arizona Constitution, Article 2, § 24

U.S. Constitution, Sixth Amendment - "...to have assistance of counsel for defence..."

#### STATEMENT OF THE CASE

Petitioner, rather than accept plea bargain, being innocent of alleged charges, chose to proceed to trial pro se. Arizona, Maricopa County Superior Court provided petitioner/defendant with Advisory Counsel to assist with pre-trial preparation and during trial, Petitioner was found guilty by jury on 3 of 6 counts; aquitted on 3 counts.

Despite phone calls and letters, petitioner was abandoned by court appointed advisory counsel during sentencing phase. Petitioner had no access to legal research nor assistance of counsel with no information on his rights during pre-sentance interview, nor provided with pre-sentance report before sentencing hearing, Petitioner was left "legally blind" during sentencing phase.

Petitioner was never aware he had a right to advisory counsel during sentencing phase until being informed by court appointed counsel during a Rule 32 appeal. See attached motion to Arizona Court of Appeals for argument.

### REASONS FOR GRANTING THE PETITION

In this case, and for/in the interest of the public and future cases, petitioner respectfully requests this court to review and provide relief on its merit of violation of due process based on absence of advisory counsel during sentencing phase.

Petitioner does not argue "ineffective counsel", rather the complete absence of advisory counsel and seeks the remedy only of a new sentencing hearing with the assistance of advisory counsel and to be provided a copy of pre-sentence report which to this day petitioner has never been provided a copy.

In the public interest in regards to improving clarity for future occurrences of this issue, petitioner suggests improvements to the Arizona Constitution, statutes, language that specifically address the rights of prose defendants to access to advisory counsel during all phases of trial including sentencing phase.

No ~~language~~ language addressing this right can be found in the Arizona Constitution, statutes or rules of court that could be found during petitioners legal research.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Cliff Simcox

Date: 9-1-21

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

CHRIS ALLEN SIMCOX,  
*Petitioner.*

No. 2 CA-CR 2020-0145-PR  
Filed September 25, 2020

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

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Petition for Review from the Superior Court in Maricopa County  
No. CR2013428563001DT  
The Honorable Jose S. Padilla, Judge

**REVIEW GRANTED; RELIEF DENIED**

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COUNSEL

Allister Adel, Maricopa County Attorney  
By Jeffrey L. Sparks, Deputy County Attorney, Phoenix  
*Counsel for Respondent*

Chris A. Simcox, Buckeye  
*In Propria Persona*

STATE v. SIMCOX  
Decision of the Court

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**MEMORANDUM DECISION**

Presiding Judge Eppich authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

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E P P I C H, Presiding Judge:

¶1 Petitioner Chris Simcox seeks review of the trial court's order dismissing his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P.<sup>1</sup> "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Simcox has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Simcox was convicted of furnishing obscene or harmful items to minors and two counts of child molestation. The trial court sentenced him to concurrent and consecutive prison terms totaling 19.5 years. The convictions and sentences were affirmed on appeal. *State v. Simcox*, No. 1 CA-CR 16-0485, ¶ 22 (Ariz. App. Oct. 17, 2017) (mem. decision). Simcox thereafter sought post-conviction relief, arguing in his petition that he had not been "afforded an opportunity to see and review the presentence report (PSR) prior to sentencing, thus violating his right to due process." The trial court held a status conference at which the petition was discussed and the court noted in its minute entry that it believed the issue had been waived and could not be raised as one of ineffective assistance of counsel because Simcox had represented himself. But, "[i]n order to make a clean record" for review, the court allowed supplemental briefing on "the role of advisory counsel after trial." Following its review of the briefing, the court summarily dismissed the petition.

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<sup>1</sup> Our supreme court amended the post-conviction relief rules, effective January 1, 2020. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). "Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules." *State v. Mendoza*, 249 Ariz. 180, n.1 (App. 2020) ("amendments apply to all cases pending on the effective date unless a court determines that 'applying the rule or amendment would be infeasible or work an injustice'" (quoting Ariz. Sup. Ct. Order R-19-0012)).

STATE v. SIMCOX  
Decision of the Court

¶3 On review, Simcox argues the trial court abused its discretion in dismissing his petition because “the absen[c]e of advisory counsel during [the] sentencing phase” and his not having been provided a copy of the presentence report were “fundamental, substantive error[s].” But these are claims of constitutional error – a due process claim and one for denial of the right to counsel – and both fall under Rule 32.1(a). As such, they are precluded due to Simcox’s failure to raise them on appeal.<sup>2</sup> *See* Ariz. R. Crim. P. 32.2(a)(3). The court therefore did not abuse its discretion in dismissing the petition.

¶4 We grant the petition for review, but we deny relief.

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<sup>2</sup>To the extent Simcox’s claim relating to advisory counsel can be read as one of ineffective assistance of counsel, the trial court correctly rejected it. *See State v. Russell*, 175 Ariz. 529, 534 (App. 1993) (“[A]fter waiving his right to counsel at trial, the defendant has no constitutionally protected right to challenge the advice or services provided by advisory counsel.”) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)).



# Supreme Court

STATE OF ARIZONA

**ROBERT BRUTINEL**  
Chief Justice

ARIZONA STATE COURTS BUILDING  
1501 WEST WASHINGTON STREET, SUITE 402  
PHOENIX, ARIZONA 85007  
TELEPHONE: (602) 452-3396

**TRACIE K. LINDEMAN**  
Clerk of the Court

April 28, 2021

**RE: STATE OF ARIZONA v CHRIS ALLEN SIMCOX**  
Arizona Supreme Court No. CR-20-0432-PR  
Court of Appeals, Division Two No. 2 CA-CR 20-0145 PRPC  
Maricopa County Superior Court No. CR2013-428563-001

**GREETINGS:**

The following action was taken by the Supreme Court of the State of Arizona on April 28, 2021, in regard to the above-referenced cause:

**ORDERED: Petition for Review = DENIED.**

A panel composed of Chief Justice Brutinel, Vice Chief Justice Timmer, Justice Bolick, and Justice Lopez participated in the determination of this matter.

Tracie K. Lindeman, Clerk

**TO:**

Linley Wilson  
Jeffrey L Sparks  
Christopher Allen Simcox, ADOC 311769, Arizona State Prison,  
Lewis - Morey  
Jeffrey P Handler, Clerk  
tkl

FILED BY CLERK

JUL 08 2021

COURT OF APPEALS  
DIVISION TWO

COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

M A N D A T E

2 CA-CR 2020-0145-PR  
Department B  
Maricopa County  
Cause No. CR2013428563001

RE: STATE OF ARIZONA v. CHRISTOPHER ALLEN SIMCOX

To: The Superior Court of Maricopa County and the Hon. Raymond L. Billotte, Judge, in relation to Cause No. CR2013428563001.

This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its Memorandum Decision and it was filed on September 25, 2020.

No Motion for Reconsideration was filed and the time for filing such has expired.

A Petition for Review was filed and DENIED by Order of the Arizona Supreme Court.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the accompanying Memorandum Decision of this Court.

I, Jeffrey P. Handler, Clerk of the Court of Appeals, Division Two, hereby certify the accompanying Memorandum Decision (see link below) to be a full and accurate copy of the decision filed in this cause on September 25, 2020.

To view the decision, please click on the following link:  
<https://www.appeals2.az.gov/APL2NewDocs1/COA/882/3595895.pdf>

DATED: July 08, 2021

JEFFREY P. HANDLER  
Judge Pro Tempore



APPENDIX A

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Christopher A. Simcox — PETITIONER  
(Your Name)

VS.

State of Arizona — RESPONDENT(S)

**PROOF OF SERVICE**

I, Christopher A. Simcox, do swear or declare that on this date, October 4, 2021, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10-4, 2021

Christopher A. Simcox  
(Signature)

ADOC # 311769

Lewis Bachman

P.O. Box 3500

Buckeye, AZ 85326

IN THE COURT OF APPEALS OF THE STATE OF  
ARIZONA DIVISION I

State of Arizona,  
Plaintiff,  
Appellee  
v.  
Chris Simcox,  
Defendant  
Appellant

Case No.: CR2013-428563-001  
Appellate Case:  
NOTICE OF PETITION FOR  
REVIEW  
Court of Appeals Div I

Issues

1. What is the role of advisory counsel after trial?  
Does absence of advisory counsel during sentencing phase constitute a fundamental, substantive error?
2. Defendant was not provided copy of presentence report before sentencing hearing; does this constitute a fundamental, substantive error?
- Defendant requests access to presentence report and new advisory counsel for the purpose of a new sentencing hearing before trial Judge José Padilla.

## Facts

Petitioner has been denied relief by Arizona Court of Appeals - Division Two, and now brings this issue before the Arizona Supreme Court for review and relief of a constitutional, due process, fundamental, substantive error that goes to the foundation of the present case.

Petitioner was sentenced without access to court appointed advisory counsel, Attorney Keri Drobak. Petitioner was not afforded a constitutional and procedural rights - access to advisory counsel and access to presentence report before and during sentencing phase of trial.

Petitioners "petition for post conviction relief" was dismissed by Maricopa County Trial Judge José Padilla on July 22, 2019. Petitioners request for review and relief of trial courts order was dismissed by Arizona Court of Appeals - Division Two - on September 25, 2020.

## Issue

Does absence of advisory counsel during sentencing phase constitute a fundamental, constitutional, substantive error?

What is the role of advisory counsel after trial?

Does a Pro se defendant have a constitutionally guaranteed right to assistance from advisory counsel during all phases of defense including sentencing phase?

Petitioner seeks relief to include access to advisory counsel, and access to presentencing report for the purpose of a new sentencing hearing before trial Judge José Padilla.

was abandoned by advisory counsel.

Arizona courts have also long recognized that a defendant's post-conviction relief proceeding is, in most circumstances, a proceeding supplementary to a direct appeal. *State v. Glassel*, 233 Ariz. 353, 312 P.3d 1119 (2013). While Petitioner did challenge his conviction on direct appeal, appellate courts do not recognize ineffective assistance of counsel claims on direct appeal. *State v. Sang Le*, 221 Ariz. 580, 212 P.3d 918 (App. 2009). Ineffective assistance of counsel claims are to be brought in postconviction relief proceedings, and any such claims improvidently raised in a direct appeal will not be addressed by appellate courts regardless of merit.

In the present case, the impetus for Petitioner's requested relief is not the garden-variety ineffective assistance of counsel claim. His claim is unique because it involves what appears to be an issue of first impression in Arizona and a matter of statewide importance due to the many appointments of advisory counsel at the trial court level. At question: does due process include advisory counsel for all phases of trial including sentencing phase? In the present case, Petitioner, defendant was left with no advisory counsel throughout the sentencing phase.

Petitioner concedes that he did not object because: 1) he did not know to object, 2) he did not

Know he could object (not having advisory counsel, nor access to legal resources while incarcerated in Maricopa County jail), and 3) he was not properly advised about his rights concerning the sentencing proceedings.

As a result, his conviction may be set aside despite the lack of objection because a fundamental error was committed. "Fundamental error" is such error that goes to the foundation of the case, (sentencing in the present case) or that which takes from any defendant a right essential to his defense (sentencing in the present case), and being denied a fair trial (sentencing) is such an error. See State v. Nettz, (App. 1977) 114 Ariz. 296, 560 P.2d 814. In the present case, Petitioner was sentenced without access to advisory counsel and without access to his presentence report. Having that report was essential to prepare for mitigation and to challenge findings made by the probation department. Without having that report, the Petitioner was at a disadvantage going into sentencing and as a result, the trial court did not have complete background and other information to fully consider the sentence to be imposed.

Rule 26.4 (c), ARCrP instructs that: Unless the court grants a request under Rule 26.3 (a)(1)(B) for an earlier sentencing, the presentence report must be delivered to the sentencing judge and to

all counsel at least two days before the date set for sentencing." Emphasis added. In the present case, the Petitioner was acting as his own counsel and was not provided the presentence report let alone having it at least two days before sentencing.

Rule 26.4 (c) appears to be both a procedural right and a substantive right because it allows counsel, the Petitioner in this case, to prepare for mitigation which is a substantive right, and to challenge inaccuracy or incomplete investigations by the probation department. Since the probation department is an arm of the court, it would appear that challenges to a presentence report would therefore be both a substantive and procedural right.

### Analysis and Points of Law

In the present case, the Petitioner was acting as his own counsel with the advice and assistance of advisory counsel, Attorney Keri Drobak. Addressing the narrow issue in the instant Petition, many courts across the country have addressed similar issues. While the various courts have come to different conclusions based on different reason, the Minnesota Supreme Court addressed the issue presented here stating that:

The role of advisory counsel is "fundamentally different from the role of counsel generally," *State v. Richards*, 552 N.W.2d 197, 207 (Minn. 1996). "Standby counsel are present 'to steer a defendant through the basic procedures of the trial' and 'to relieve the judge of the need to explain and enforce basic rules of [the] courtroom.'" *Id.* at 206 (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 184, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)). But the standard by which standby counsel's representation is to be measured "remains an open question." *Id.* at 207. [*State v. Clark*, 722 N.W.2d 460 (Minn. 2006)]

At least in Arizona, our Court of Appeals addressed a similar issue in *Montgomery v. Superior Court In and For County of Maricopa*, 178 Ariz. 84, 870 P.2d 1180 (App. 1993), review granted, affirmed as modified 181 Ariz. 256, 889 P.2d 614, supplemented 182 Ariz. 118, 893 P.2d 1281, stating that:

"Hybrid representation," i.e. simultaneous representation by counsel and pro se, differs from representation by advisory counsel, which involves counsel providing pro se defendant with technical assistance in courtroom without participating in actual conduct of trial.

The California Supreme Court in *Brookner v. Superior Court*, 64 Cal.App.4th 1390, 76 Cal.Rptr.2d 68 (1998), stated that:

Hybrid modes of representation pose particularly serious dilemmas for the appointed attorney. The terms "advisory counsel" and "standby counsel" are seldom defined with any sort of analytical precision. (See, e.g. *Hamilton*, *supra*, 48 Cal. 3d at p. 1164, fn. 14, 259 Cal. Rptr. 701, 774 P.2d 730 [ "The cases have loosely used such terms as... 'advisory counsel,' 'standby counsel,' and 'hybrid representation' to describe a multitude of situations in which both the accused and professional counsel are involved in the presentation of the defense case." ] )

Yet an advisory or standby counsel is subject to "claims of 'ineffective assistance' which arise directly from assisting counsel's breach of the limited authority and responsibilities counsel has assumed. [Citation.]" (*Ibid.*, *italics in original.*)

Although an advisory counsel's role is not clearly defined and is a limited one (see *People v. Clark* (1992) 3 Cal. 4th 41, 112, 10 Cal. Rptr. 2d 554, 833 P.2d 561), it is apparent that more is required of him than simply standing by, waiting to take over; he is appointed to provide advice to the in pro. per. defendant, which constitutes aiding in a criminal defense. His role seems to be more akin to the helpful director than a second-string actor.

Finally, the New Jersey Supreme Court in *State v. Davenport*, 177 N.J. 288, 827 A.2d 1063 (2003), stated that:

Although we have not addressed the proper role of standby counsel, the Appellate Division did in *State v. Gallagher*, 274 N.J. Super. 285, 644 A.2d 103 (App. 1994), characterizing the role consistent with its depiction in *McKaskle*. The court explained that "[s]tandby counsel may be appointed to provide the defendant with advice and assistance and to facilitate communications with the court," but that "the Constitution ... 'impose[s] some limits on the extent of standby counsel's unsolicited participation.'")

*Id.* at 296, 644 A.2d 103 (quoting *McKaskle*, *supra*, 465 U.S. at 177, 104 S. Ct. at 950, 79 L.Ed.2d at 132-33).

From the various opinions above, it would appear that there is a general consensus that the role of advisory counsel is to steer, provide technical assistance, advise, assist, and facilitate communications, without directly participating in a trial, which is more than simply standing by waiting to take over. In analogous language, it would appear that the role of advisory counsel to a pro se defendant is parallel to how complicity applies to a crime. When advisory counsel simply stands by and does nothing, he or she is merely present much like the defense of mere presence - in other words, there is no responsibility. Conversely, advisory counsel is usually appointed for a purpose - to do something affirmative, most

importantly, provide legal guidance on procedural matters and legal advice. In that capacity as a legal advisor, it is often necessary to interpret the law and provide guidance on procedural matters which as the Minnesota Supreme Court recognized to relieve the judge of the need to explain and enforce court room rules. In the instant case, defendant was without advisory counsel for the sentencing phase; defendant was absent any access to legal advice, procedural matters and legal advice.

Since there can be little argument that a pre-sentence report is a procedural matter, it follows that the role of advisory counsel posttrial would be to advise the pro se defendant that he or she is entitled to receive the presentence report at least two days prior to sentencing in order to prepare him or her for mitigation and the sentencing proceeding. If the role of advisory counsel were to simply standby and do nothing, there would be no need to appoint an attorney to do that job.

The mere fact that an attorney is appointed suggests that a trained professional is needed to safeguard the rights of both the accused pretrial, and the convicted posttrial. Both possibilities demonstrate that the role of advisory counsel can vary widely from case-to-case, and both possibilities thus implicitly reveal the importance of defining advisory counsel's

role. As a result, a dilemma is presented: should the role or scope of advisory counsel's duties be defined by the appointed attorney, or by the trial judge who exercises discretion in defining the role or scope of the duties of advisory counsel, or should the role or scope be defined elsewhere.

Given the lack of clarity over what, exactly, is the role of advisory counsel, the following possibilities exist. If the appointed attorney is left to define his or her own role or scope, every defendant will likely receive a different level of advice and or participation which may lead to inequality in defense, thereby leading to continued confusion. If the trial judge exercises discretion defining the role or scope, a similar result is possible thereby leading to continued confusion. In the instant

case there remains the question of due process: Is a defendant to be afforded access to advisory counsel through all phases of his or her defense proceedings, including the sentencing phase?

It would seem to make sense that the role or scope of advisory counsel be standardized in some fashion and reduced to a writing that all involved understand and follow. In that regard, it is respectfully requested this court conduct an evidentiary review of the instant case. A record should be made, especially for the purpose of appeal, whereby procedures are advocated for clearly defining the role or scope of

advisory counsel both pretrial and posttrial, and how those procedures are to be reduced to writing.

In addition, it is further respectfully suggested that if advisory counsel is appointed, advisory counsel should provide legal advice, and in that role should assist the defendant through all trial phases including post - conviction, providing advice on procedural and substantive matters.

It is further respectfully suggested that other authority, such as the legislature or the rulemaking authority of the Arizona Supreme Court be invoked to change, modify, or extend the Arizona Rules of Criminal Procedure to clearly define the role of advisory counsel throughout the state.)

It is further respectfully suggested the trial court be involved in this procedure by advising would be prose defendants on the record as to the scope of advisory counsel's appointment so defendants would be less likely to manipulate the system by repeated requests for new counsel, and possibly reducing the number of Rule 32 proceedings. The above suggested procedure would have the benefit of clarity for the court, counsels on both sides, defendants, and would be in the interest of judicial economy by reducing delays for repeat appointments, financial burdens on appointing agencies, and keeping cases progressing forward.

## Conclusion

In the present case, the Petitioner was not afforded a procedural right- access to the presentence report and sufficient time to prepare mitigation, prepare for sentencing, fully informing the court of background and other information, and being able to challenge the findings of the presentence investigation. Petitioner, defendant was not availed assistance of advisory counsel during sentencing phase. Being denied those procedural rights also resulted in the denial of substantive rights to present mitigation and challenge the findings of the presentence investigation.

As a result, Petitioner respectfully requests this court grant his Petition for review, permit the Petitioner access to advisory counsel and to present his mitigation, permit the Petitioner to challenge the presentence report after obtaining a copy of the report, to challenge the report writer's investigation, and permit the Petitioner to fully inform the sentencing court of his background and other information, and re-sentence the defendant accordingly.

It is respectfully requested this court accept review conduct its evidentiary process/hearing to fully develop the facts and record for the purpose of granting a new sentencing hearing, and for the purposes of appeal whereby the above procedures can be fully developed.

Dated this 22nd day of August, 2019.

Chris Simcox

Chris A. Simcox

Defendant pro se

Petitioner

Original of the foregoing Petition for Review filed  
by mail this 22nd day of August, 2019, with:

The Clerk of the Arizona Court of Appeals Div 1

A copy of the foregoing Petition for Review  
mailed this 22nd day of August, 2019, to:

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Judge José Padilla

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