

No.

IN THE
SUPREME COURT OF THE UNITED STATES

RAKEEM BARBER
Petitioner

v.

STATE OF ARIZONA

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

PETITION FOR WRIT OF CERTIORARI

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Question Presented

State and federal courts are jointly responsible for the enforcement of federal constitutional rights. Is Arizona's collateral review scheme adequate to vindicate the constitutional rights of non-capital defendants when its superior courts only review claims of ineffective assistance of counsel on collateral review, even though Arizona's collateral review rule, Rule 32.1(a), does not place any limit on the categories of constitutional claims a petitioner may raise in his first petition for postconviction relief?

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Parties to the Proceedings

Petitioner is Rakeem Barber. The State of Arizona was the Respondent below. No party is a corporation.

Petition for Writ of Certiorari

Petitioner, Rakeem Barber, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Arizona, Division One.

Memorandum Decisions and Orders Below

The Superior Court of Arizona, Maricopa County, dismissed Rakeem Barber's petition for postconviction relief on January 13, 2022. *State v. Barber*, No. CR2015-111701-002 DT, CR2015-141119-002 DT (Consolidated) (Jan. 13, 2022). (Pet. App. A.) In a memorandum decision, the Arizona Court of Appeals, Division One, affirmed the trial court's judgment on December 15, 2022. *State v. Barber*, No. 1 CA-CR 22-0176 PRPC (Dec. 15, 2022). (Pet. App. B.) The Supreme Court of Arizona denied discretionary review on August 25, 2023. *State v. Barber*, No. CR-23-0002-PR (Aug. 25, 2023). (Pet. App. C.)

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Jurisdictional Statement

The superior court, in its role as the postconviction review court, dismissed Barber's postconviction relief petition on January 13, 2022. The Arizona Court of Appeals affirmed the trial court judgment on December 15, 2022. The Arizona Supreme Court denied discretionary review on August 25, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Pursuant to 28 U.S.C. § 2101(d) and Rule 13.1 of the Rules of the Supreme Court, the petition for a writ of certiorari to review the judgment of a State court in a criminal case is due by November 22, 2023.

Constitutional Provisions

The Fourteenth Amendment, U.S. Const. amend. XIV, provides in relevant part:

“No state shall * * * deprive any person of life, liberty, or property, without due process of law.”

The Supremacy Clause, U.S. Const. art. VI, para. 2, provides in relevant part:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

Introduction

This Court has had occasion to both certify a question to the Arizona Supreme Court concerning the proper interpretation of its rule precluding collateral review and caution Arizona that its collateral review scheme may run afoul of federal law. *Stewart v. Smith*, 536 U.S. 856 (2002); *Martinez v. Ryan*, 566 U. S. 1 (2012); *Shinn v. Martinez Ramirez*, 596 U.S. 366 (2022); *Cruz v. Arizona*, 598 U.S. 17 (2023). The Ninth Circuit and the Arizona District Court have also pointed out that there are anomalies in Arizona's collateral review scheme that impede federal review. *Poland v. Stewart*, 169 F.3d 573 (9th Cir. 1999); *Ceja v. Stewart*, 97 F.3d 1246 (9th Cir. 1996); Report and Recommendation, CV-17-1834-PHX-DWL (JFM) (D. Ariz. Sept. 30, 2020) Document 125.

While the Supreme Court of Arizona has tweaked its criminal procedural rules repeatedly in the past thirty years, it has not squarely addressed that Rule 32.2, its rule precluding review in collateral proceedings, is subject to abuse, results in work-arounds, and systemically deprives non-capital defendants of the ability to vindicate constitutional rights in state and federal courts.

In that vacuum, a practice has developed in Arizona wherein the only constitutional claim Maricopa County Superior Court reviews on collateral review is a claim of ineffective assistance of counsel (IAC). The state court finds all other allegations of constitutional violation precluded, even when raised in the first petition for post-conviction relief. The state court principally relies on *State v. Carriger*, 692 P.2d 991 (Ariz. 1984) (*Carriger II*), and *Stewart v. Smith*, 46 P.3d

1067 (Ariz. 2002), for the proposition that all non-IAC claims must be raised on direct appeal and collateral review is precluded by Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure.

However, states are required to provide a mode by which federal constitutional rights are to be vindicated after conviction, *Carter v. Illinois*, 329 U.S. 173, 175–76 (1946), and both the Arizona Supreme Court and the Arizona Legislature provide for collateral review. A petitioner may *only* raise constitutional claims on collateral review but may raise a variety of claims (including constitutional claims) on direct appeal. A.R.S. § 13-4033(A)(1) (“Appeal by defendant”); A.R.S. § 13-4231(1) (“Scope of post conviction relief”); Ariz. R. Crim. P. 31 (direct appeal); Ariz. R. Crim. P. 32 (postconviction review).

The state court’s use of the rule of preclusion to bar review of constitutional claims raised for the first time in the forum designated by rules of court and the legislature, is a local practice that renders state procedural vehicles systematically inadequate to vindicate constitutional rights in Maricopa County. As a result, non-capital defendants cannot present their federal claims to the state court consistently with Arizona’s codified procedural rules, raise all of their federal claims in state court before seeking federal relief, develop the state court record, or avail themselves of the state court duty to “pass upon and correct alleged violations of prisoners’ federal rights.” *Martinez Ramirez*, 596 U.S. at 378.

Barber, a non-capital defendant who contested the charges against him at trial, presented constitutional claims in both forums, but he only received review

of his derivative ineffective assistance of counsel claims in postconviction proceedings. This Court should grant certiorari at this juncture, as invocation of the procedural default doctrine forecloses review in other forums. The local practice conflicts with this Court’s canonical decisions, as it denies petitioners procedural due process, access to the courts, undermines the maxim that state and federal courts are jointly responsible for the enforcement of federal constitutional rights, and impedes federal-state comity.

Statement of the Case

A. Factual and Procedural Background Giving Rise to Due Process Violations.

Rakeem Barber is serving a 15-year sentence imposed for the commission of a residential burglary. A rental car, secured by law enforcement near the site of the residential burglary, led officers to arrest three men within a few hours of the commission of the offense. The three were transported to South Mountain Precinct in Phoenix, Arizona, where two of the men waived their right to remain silent and made statements to law enforcement. The men admitted to their presence in the vicinity of the crime scene but denied they committed a burglary. Law enforcement searched the apartment of one of the men after his arrest and found a pile of jewelry on a dresser in the bedroom, as well as an organized collection of jewelry hanging from hooks on a nightstand. The homeowner later identified a three-strand string of pearls from the pile of jewelry as a set her son had given her for Christmas some years earlier. A search incident to arrest of the other suspect disgorged a gold-colored pocket watch, a pocket knife, and a key to

the rental vehicle abandoned near the burglarized home. The homeowner identified this gold-colored pocket watch as an item taken during the burglary of her home.

Law enforcement did not find stolen goods on Barber when he was arrested in the company of one of the co-defendants. Barber exercised his right to remain silent after arrest and did not make any statements to law enforcement. Barber had 630 dollars at the time of arrest and he would later testify at trial that 600 of those dollars was reimbursement for renting the vehicle on behalf of a friend.

B. Trial and Direct Review Proceedings

All three men were charged with the offense, and the matter proceeded to a joint trial. After a 15-day trial, the jury found the men guilty as charged. On direct appeal, Barber raised a due process claim in regards to the reasonable doubt jury instruction. Barber also litigated a deprivation of the right to confrontation, as the homeowner testified via video-conference. Last, Barber litigated a claim of *Doyle*¹ error, contending the prosecutor had impermissibly introduced evidence of post-arrest silence.

C. Collateral Review Proceedings

Pursuant to rule and statute, an Arizona petitioner may allege as ground for relief that a conviction was obtained in violation of the Constitution of the United States or the State of Arizona. Ariz. R. Crim. P. 32.1(a); A.R.S. § 13-

¹ *Doyle v. Ohio*, 426 U.S. 610 (1976).

4231(1); Ariz. Const. art. II, § 24. On collateral review, Barber alleged that his convictions were obtained in violation of the following constitutional protections:

- (1) The Sixth Amendment rights to a fair trial as he underwent a joint trial with two co-defendants who admitted they were at the scene of a burglary and were in possession of stolen goods;
- (2) The Fifth Amendment right to remain silent as he took the stand to counter prejudicial evidence that imputed guilt based on the statements and activity of the other defendants and the evidence from a police officer alluding to his invocation of the right to remain silent after arrest;
- (3) The right to procedural due process under the Fourteenth Amendment, due to the use of a suggestive photographic lineup conducted months after the offense occurred;
- (4) The Sixth Amendment right to effective representation by trial counsel, as she failed to move for severance and litigate suggestiveness and reliability of identification evidence pretrial; and
- (5) The Sixth Amendment right to effective representation by direct appeal counsel, as she failed to litigate restitution-related claims on direct appeal.

The state court ruled the free-standing claims of constitutional violation were precluded because they had not been raised on direct appeal. (Pet. App. 3a.) The state court then ruled the derivative claim of ineffective assistance of trial counsel was not colorable, and, further, Barber failed to meet his burden of establishing the restitution claim was stronger than the claims appellate counsel selected for the direct appeal. (Pet. App. 4a.)

D. Appellate Review Proceedings

Barber filed a petition for review to the court of appeals arguing the rulings of the state court denied him due process and were erroneous under state and Federal law. Barber contended the finding of preclusion categorically violates Arizona's statute and procedural rule directing petitioners to raise claims of constitutional error in collateral review proceedings. Barber argued his claim of ineffective assistance of trial counsel was derivative of the free-standing claims of constitutional violation and was clearly colorable but for the failure to consider the primary claims. The criminal restitution claim was likewise meritorious, as economic loss is statutorily defined and the issue was contested and preserved for appellate review in accordance with criminal procedural rules.

The court of appeals granted review but denied relief. (Pet. App. 8a.) The court of appeals held it is the petitioner's burden to show that the superior court abused its discretion by denying the petition for postconviction relief, and Barber had failed to show an abuse of discretion:

Absent an abuse of discretion or error of law, this court will not disturb a superior court's ruling on a petition for post-conviction relief. *State v. Gutierrez*, 229 Ariz. 573, 577, ¶ 19, 278 P.3d 1276, 1280 (2012). It is petitioner's burden to show that the superior court abused its discretion by denying the petition for post-conviction relief. See *State v. Poblete*, 227 Ariz. 537, ¶ 1, 260 P.3d 1102, 1103 (App. 2011) (petitioner has burden of establishing abuse of discretion on review).

We have reviewed the record in this matter, the superior court's order denying the petition for post-conviction relief, the petition for review, the state's

response, as well as petitioner's reply. The petitioner has failed to show an abuse of discretion.

(*Id.*)

Barber petitioned the Arizona Supreme Court for review as follows:

1. The decision of the court of appeals was contrary to or involved an unreasonable application of clearly established Federal and Arizona law, mandating *de novo* review of claims contesting the interpretation of rules of criminal procedure and alleging deprivation of constitutional rights;
2. The PCR court denied Barber due process of law by invoking Rule 32.2(a)(3), the rule of preclusion, to bar review of claims alleging Barber's convictions were obtained in violation of the United States or Arizona constitutions, as Rule 32.1(a) expressly permits petitioners to raise constitutional claims in the first petition for post-conviction relief; and
3. Review of the PCR court's decision on Barber's ineffective assistance claims was warranted on discretionary review, as the trial court did not review Barber's primary claims of violation of constitutional protections before dismissing his ineffective assistance of counsel claims.

The Arizona Supreme Court denied discretionary review. (Pet. App. 9a.)

Reasons for Granting the Petition

I

A local practice has developed in Arizona that precludes defendants from litigating federal constitutional claims in the designated state court forum.

Arizona's rules of preclusion are often said to be "clear, consistently applied, and well-established," and, therefore, adequate to bar federal review. *See e.g. Hurles v. Ryan*, 752 F.3d 768, 780 (9th Cir. 2014); *Poland v. Stewart*, 169

F.3d 573, 578 (9th Cir. 1999); *Ortiz v. Stewart*, 149 F.3d 923, 931–32 (9th Cir. 1998); *accord*, *Smith*, 536 U.S. at 860; *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *but see Ceja v. Stewart*, 97 F.3d 1246, 1252 (9th Cir. 1996).

The presumption of consistent measured application of state procedural rules on collateral review may well be true in capital cases, where litigants are granted years to develop the appellate record, under special rules of procedure, and are assured review in the state supreme court.² The presumption is not imputable to the collateral review non-capital defendants are accorded in the superior courts of Arizona. In collateral review proceedings, non-capital defendants are presently limited to litigating ineffective assistance of counsel claims. The superior court applies the preclusion doctrine to all other allegations of constitutional violation, even when raised in the first petition for post-conviction relief. Rote claim preclusion is so ingrained in the state courts of Arizona that the prosecution categorized Barber’s attempt to vindicate numerous constitutional rights in his first petition for postconviction relief as “novel.” (Response to Petitioner’s Petition for Review, at 6.)

Entering a finding of preclusion at the juncture of a *first* postconviction relief petition deprives Barber, and similarly-situated petitioners, of procedural

² See, e.g. Ariz. R. Crim. P. 32.4(b)(3)(B) (2020) (directing the clerk of the state supreme court to file a notice of post-conviction relief with the trial court once direct appeal proceedings are concluded); Ariz. R. Crim. P. 32.5(b) (2020) (regulating appointment of counsel in capital cases); Ariz. R. Crim. P. 32.7(a)(2) (2020) (providing for extended deadlines for filing a petition for postconviction relief).

due process. As this Court has noted, “[i]t is the solemn duty of these [state] courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 259 (1973). Further, in the context of habeas review, this Court had admonished against interpreting procedural prescriptions to “trap the unwary pro se prisoner”. *Slack v. McDaniel*, 529 U. S. 473, 487 (2000) (quoting *Rose v. Lundy*, 455 U. S. 509, 520 (1982)).

Historical overview of Arizona Rule 32 governing postconviction review and legislative enactments

The Arizona Supreme Court has exclusive authority to promulgate court rules, and pursuant to this separation of powers, the Arizona Legislature lacks authority to enact a statute if it conflicts with or tends to engulf the Arizona Supreme Court’s constitutionally-vested rulemaking authority. Ariz. Const. Art. VI, § 5; *State ex rel. Napolitano v. Brown*, 982 P.2d 815, 817 (Ariz. 1999). See also *Spears v. Stewart*, 283 F.3d 992, 1014 (9th Cir. 2002) (construing Arizona law and stating that “although the legislature may, by statute, regulate the practice of law, a court rule governing the practice of law trumps statutory law”). Nonetheless, in 1984, the Arizona Legislature enacted A.R.S. §§ 13-4231–4240, as a statutory parallel to Rule 32 of the Arizona Rules of Criminal Procedure.

A Rule 32 proceeding is the primary forum for litigating constitutional claims,³ and the Arizona Supreme Court has stated that Rule 32 “outline[s] the process by which a convicted defendant may obtain post-conviction relief,” *Canion v. Cole*, 115 P.3d 1261, 1262 ¶ 5 (Ariz. 2005). In addition, Rule 32 allows a defendant to raise issues unknown or unavailable at trial. *State v. Watton*, 793 P.2d 80, 85 (Ariz. 1990). Further, “[o]ne of the purposes of a Rule 32 proceeding ‘is to furnish an evidentiary forum for the establishment of facts underlying a claim for relief, when such facts have not previously been established of record.’” *Watton*, 793 P.2d at 85 (quoting *State v. Scrivner*, 643 P.2d 1022, 1024 (Ariz. App. 1982)); *accord*, *State v. Bennett*, 146 P.3d 63, 68 ¶ 30 (Ariz. 2006) (“When facts have not previously been established of record, Rule 32 furnished an evidentiary forum for the establishment of facts underlying a claim for relief.”).

Rule 31.10, Arizona’s rule of criminal procedure attendant to contents of briefs in direct appeal proceedings, simply provides that any issue raised on direct appeal must be supported by argument and citations of legal authority. Ariz. R. Crim. P. 31.10(a)(7) (2018). The corollary rule attendant to collateral review provides that a petitioner may allege as ground for relief that a conviction was obtained in violation of the state and the Federal constitution. Ariz. R. Crim. P. 32.1(a) (2020).

³ *State v. Mata*, 916 P.2d 1035, 1048 (Ariz. 1996) (noting that both the statute and the rule allow a petitioner, *inter alia*, to raise claims that the conviction or sentence was in violation of the federal or state constitution).

Rules of procedure instruct litigants to “present their contentions to the right tribunal at the right time,” *Massaro v. United States*, 538 U.S. 500, 504 (2003), and on its face, Arizona’s collateral review rule, Rule 32.1(a), does not place any limit on the categories of constitutional claims a petitioner may raise in his first petition for postconviction relief:

Grounds for relief are...(a) the defendant’s conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions.

Ariz. R. Crim. P. 32.1(a) (2020). The most recent comment to the rule explains that Rule 32.1(a) litigation, “encompasses most traditional post-conviction claims, such as the denial of counsel, incompetent or ineffective counsel, or violations of other rights based on the United States or Arizona constitutions.” Ariz. R. Crim. P. 32.1(a), Cmt. (2020); *see generally, Wall v. Kholi*, 562 U.S. 545, 551-52 (2011) (defining collateral review as “a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process.”); *United States v. Addonizio*, 442 U.S. 178, 185-86 (1979) (identifying the categories of claims that fall within “the established standards of collateral attack” as claims that a proceeding violated a defendant’s constitutional rights, the imposed sentence fell outside of statutory limits, or that “the proceeding was ... infected with [an] error of fact or law of the ‘fundamental’ character that renders the entire proceeding irregular and invalid.”)

Comity

In light of the appellate review scheme Arizona adopted, federal courts review “federalized” claims regardless of whether they were presented on direct

appeal or in postconviction proceedings. *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994) (“To exhaust one’s state court remedies in Arizona, a petitioner must first raise the claim in a direct appeal or collaterally attack his conviction in a petition for post-conviction relief pursuant to Rule 32.”); *see also, Summers v. Schriro*, 481 F.3d 710, 713 (9th Cir. 2007) (concluding that Arizona’s ‘Rule 32 of-right proceeding’ was a form of direct review based, in part, on the express holding of Arizona courts that a Rule 32 of-right proceeding is ‘the functional equivalent of a direct appeal.’); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999) (“Recognizing that ‘each state is entitled to formulate its own system of post-conviction relief, and ought to be able to administer that system free of federal interference,’ we must credit Arizona’s choice.”) (internal citation omitted); *accord, Peterson v. Lampert*, 319 F.3d 1153, 1155-56, 1159 (9th Cir. 2003); *Jennison v. Goldsmith*, 940 F.2d 1308, 1310-11 (9th Cir. 1991). *See also O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (claim exhaustion is determined by the right under state law to raise, by any available procedure, the questions presented). This Court has had occasion to examine the parameters of the post-conviction review scheme Arizona has chosen to adopt, and noted that deferring constitutional claims until the collateral stage of review is “not without consequences for the State’s ability to assert a procedural default in later proceedings.” *Martinez v. Ryan*, 566 U. S. 1, 13 (2012).

Local Practice

In contravention of the codified rule and statute, the state court, in its collateral review capacity, systemically applies the preclusion rule even in a first collateral review petition. Invocation of the preclusion doctrine in Arizona began in earnest in 1992⁴, but the preclusion of all non-IAC claims is of more recent vintage although neither the procedural rule, the comments to the procedural rule, the opinions of the Arizona Supreme Court, the statute, or its legislative history, limit collateral review proceedings solely to ineffective assistance of counsel litigation. *See State v. Krum*, 903 P.2d 596, 600 (Ariz. 1995) (“Additionally, post-conviction proceedings generally provide a remedy only for constitutional errors involving the defendant’s trial or direct appeal of right.”); *Montgomery v. Sheldon*, 889 P.2d 614, 616 (Ariz. 1995) (“Although procedurally distinct, Rule 32 proceedings and direct appeal are both devices for ensuring that every defendant receives due process of law.”); A.R.S. § 13-4231(1) (“Scope of Post-Conviction Relief”); A.R.S. § 13-4033(A)(1); 1992 Ariz. Sess. Laws Chps. 184 § 1, 358 §§ 1-9; HB 2534, 40th Leg., 2d Reg. Sess. (Ariz. 1992); House Bill Summary for HB 2534, 40th Leg., 2d Reg. Sess. (Ariz. Mar. 4, 1992); Minutes of House Comm. on Judiciary, 40th Leg., 2d Reg. Sess., at 2 (Ariz. Mar. 9, 1992).

⁴ See e.g. *Krone v. Hotham*, 890 P.2d 1149, 1150 (Ariz. 1995) (“Before 1992, a defendant could file a petition for post-conviction relief ‘at any time after entry of judgment and sentence.’”); *Moreno v. Gonzalez*, 962 P.2d 205, 209 ¶ 22 (Ariz. 1998) (addressing implementation of time limits to commence collateral review in non-capital cases).

(Streamlining postconviction relief but explaining that the unitary postconviction relief procedure would simply remove repetitiveness from the process but not limit a defendant's ability to challenge constitutional error).

Notwithstanding the instruction that "a post-conviction proceeding is part of the original criminal action and is not a separate action," the state court did not conduct the analysis mandated by state law to determine whether Barber was raising a constitutional claim for the first time in a first petition for collateral review. Instead the state court found the non-IAC claims waived, ostensibly because they could have been raised on direct appeal:

"[T]o prevent endless or nearly endless reviews of the same case in the same trial court," *Stewart v. Smith*, 202 Ariz. 446, 450 ¶ 11, 46 P.3d 1067, 1071 (2002), Rule 32.2(a) precludes collateral relief on a ground that either was or could have been raised on direct appeal or in a previous PCR proceeding." *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009).

Except for arguing that the presentation of evidence improperly suggested Defendant invoked his right to remain silent, Defendant did not raise issues 1-3 on appeal. The state argues that Pursuant to ARCP 32.2(a)(3) defendant is precluded from raising these issues.

Defendant argues that the defendant's Constitutional rights were violated. However, 32.2 (a)(3) is clear, remedy is precluded on issues waived on appeal except a violation of a "constitutional right that can only be waived knowingly, voluntarily and personally by the defendant."

(Pet. App. 3a.)

The local practice results in a systemic deprivation of procedural due process

The adequacy of state procedural rules is a federal question, *Beard v. Kindler*, 558 U. S. 53, 60 (2009), *Lee v Kemna*, 534 U.S. 362, 375 (2002), and the rationale of the state court deprived Barber, and similarly-placed petitioners, of the ability to seek full vindication of their federal constitutional rights in state courts.

In relevant part, the preclusion rule provides that, a defendant is precluded from relief under Rule 32.1(a) based on any ground:

waived at trial or on appeal, or in any previous post-conviction proceeding, except when the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.

Ariz. R. Crim. P. 32.2(a)(3) (2020).⁵

⁵ Previous iterations of Rule 32.2 precluded petitioners from raising claims “finally adjudicated on the merits on appeal or in any previous collateral proceeding,” or “knowingly, voluntarily and intelligently not raised at trial, on appeal, or in any previous collateral proceeding,” *Mata*, 916 P.2d at 1048-49 (discussing pre-1992 version of the A.R.S. § 13-4232(C) (pre-1992) and Rule 32.2(c) (pre-1992).preclusion rule).

Rule 32.2(a)(3) was formerly numbered Rule 32.2(c) and previously provided, in pertinent part, that “[t]he court may infer from the petitioner’s failure ... to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so ... that he knowingly, voluntarily and intentionally relinquished the right to do so.” *State v. Herrera*, 588 P.2d 305, 307 (Ariz. 1978).

The failure of the state court to follow state procedural rules systemically deprives petitioners of procedural due process

As set forth above, rules of procedure instruct litigants to “present their contentions to the right tribunal at the right time,” *Massaro*, 538 U.S. at 504. The procedural rules of this Court embody this principle as practitioners before this Court need look no further than the rules of court themselves to present their claims for adjudication. Barber presented his constitutional claims on collateral review as delineated in the state procedural rules and the foreclosure of review via invocation of a rule restricting review of *successive* collateral review petitions denies him due process. The state courts do not comply with the state procedural rules, yet, the Arizona Supreme Court has instructed that a rule of court, “prescribes a procedural course of conduct that litigants are required to follow, the failure to comply with which may deprive the parties of substantial rights.” *Hare v. Superior Court*, 652 P.2d 1387, 1389 (Ariz. 1982). Refining *Hare*, the Arizona Supreme Court later explained that “a procedural requirement is a ‘rule’ of court if it prescribes a course of conduct uniformly applicable to parties and their attorneys to govern the manner in which claims or demands are made or defenses asserted.” *State ex rel. Romley v. Ballinger*, 97 P.3d 101, 103 ¶¶ 7-9 (Ariz. 2004).

The local decree that all non-IAC claims must be raised on direct appeal systemically deprives petitioners of procedural due process

Contrary to the reasoning of the state court, an Arizona petitioner is not required to raise constitutional claims on direct appeal. The Arizona statute and rule implementing the right to a direct appeal do not direct a petitioner to raise constitutional claims on direct appeal. The rule of procedure governing direct appeal only provides that any issue raised must be supported by argument and citations of legal authority. Ariz. R. Crim. P. 31.10(a)(7) (2018). The statute only identifies the types of proceedings a petitioner may appeal therefrom: (1) a final judgment of conviction or verdict of guilty except insane; (2) an order denying a motion for a new trial; (3) an order made after judgment affecting the substantial rights of the party; and (4) a sentence on the grounds that it is illegal or excessive. A.R.S. § 13-4033(A).

The prosecution and the state courts, however, principally rely on *Carriger II*, for the premise that Rule 32 proceedings are not designed to afford a second appeal or unnecessarily delay the rendition of justice—even though the Arizona Supreme Court has never directed petitioners to raise all constitutional claims on direct appeal. Moreover, at least since 2016, Arizona’s Prosecuting Attorneys’ Advisory Council (APAAC) has advised prosecutors that the only claims that could be raised on collateral review are IAC claims. *See 2016 Appeals for Trial Prosecutors, Post-Conviction Relief Training Manual* (Sept. 23, 2016).

APAAC also trained prosecutors to argue that all other constitutional claims had to have been raised on direct appeal and were precluded by Rule 32.2(3).⁶

Although uniformly cited by the prosecution and the postconviction review courts, *Carriger II* was superseded by statute and rule in 1992. Yet the opinion still has some relevancy as it is the seminal case wherein the Arizona Supreme Court noted that the type and number of issues a petitioner may raise on direct appeal are not limited by a *per se* rule:

The type of issues an appellant can raise in an appeal and the number of issues an appellant can raise are not limited by a *per se* rule. Cf. Ariz. Const. art. 2, § 24; A.R.S. § 13-4031; Rule 31.13(c)(1)(iv) (none of which set any limits on appeal). As a long-standing practice, however, this court, like other appellate courts, will not tolerate a party's presentation of claims that have no arguable merit. If meritorious, we will consider a claim even if the claim ultimately does not constitute reversible error. The type of issues a petitioner may raise in a Rule 32 petition are limited by court rule. See Rule 32.1.

Carriger II, 692 P.2d at 994. Although it can be inferred that the state supreme court expressed a preference for presenting claims of reversible error on direct appeal, it clearly did not mandate it. *Id.* It is also clear that the state supreme court did not state that only IAC claims may be raised on collateral review.

The petitioner in *Carriger* was litigious and ushered in the enforcement of the preclusion doctrine in Arizona. Nonetheless, after the Arizona Supreme Court

⁶ A publicly available hyperlink to the document cannot be provided, as APAAC does not make its resources available to the public any longer. The document will be provided if this Court determines that further briefing is warranted.

restructured Rule 32 in 1992, it did not modify the appellate process or instruct state courts to apply the rule of preclusion if a claim had not been raised on direct appeal. The claim review procedure remained as the Arizona Supreme Court discussed in *Carriger I*: “The issue of defendant’s inadequate representation at the sentencing was not raised or considered by this court. Having not been raised in the appeal, it is not precluded by Rule 32.2(a)(2),...from being raised in the instant post-conviction hearing.” *State v. Carriger*, 645 P.2d 816, 819 (Ariz. 1982) (*Carriger I*) (cleaned up).

State v. Soto, 224 P.3d 223, 227 ¶ 12 (Ariz. App. 2010), is also instructive. Therein, the court of appeals explained that potential claims of error that may be raised on direct appeal include errors occurring under state law with no accompanying Federal or state constitutional right. For example, a petitioner may raise claims premised on state statutory interpretation, violations of state rules of criminal procedure, and errors in the admission or preclusion of evidence. *Id. See generally, Fay v. Noia*, 372 U.S. 391, 430 (1963) (on direct appellate review of a state court judgment, the Supreme Court “is concerned only with the judgments or decrees of state courts.”).

The *general* rule of preclusion applies to nonconstitutional claims that could have been raised on direct appeal but were not. The *codified* rule of preclusion was enacted to streamline collateral review. *Smith*, 46 P.3d at 1071 ¶ 11 (“Rule 32.2 is a rule of preclusion designed to limit those reviews, to prevent endless or nearly endless reviews of the same case in the same trial court.”); *State*

v. Shrum, 203 P.3d 1175, 1177–78, ¶¶ 5–6, 12 (Ariz. 2009) (noting preclusive effect of the dismissal of a *first* Rule 32 proceeding and finding that the rule precludes relief on ground raised or that could have been raised on direct appeal or previous Rule 32 proceeding). Ariz. R. Crim. P. 32.2(a)(1) (precluding claim still raiseable on direct appeal under Rule 31 or in a post-trial motion under Rule 24); Ariz. R. Crim. P. 32.2(a)(2) (precluding a claim finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding); Ariz. R. Crim. P. 32.2(a)(3) (precluding a claim waived at trial, on appeal, or in any previous post-conviction proceeding). Invocation of the rule of preclusion against petitioners litigating constitutional claims in their *first* postconviction petition points to a systemic denial of due process.

The invocation of the preclusion doctrine at the juncture of the first postconviction relief petition systematically deprives petitioners of procedural due process.

A preclusive determination of waiver at the juncture of a *first* postconviction relief petition deprives Barber, and similarly-situated petitioners, of due process, as the failure to properly assert a constitutional right is a forfeiture and not a waiver. *United States v. Olano*, 507 U.S. 725, 733-34 (1993) (“Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the “intentional relinquishment or abandonment of a known right.”); accord, *State v. Martinez*, 115 P.3d 618, 620 n. 2 (Ariz. 2005) (“Defendants who fail to object to error at trial do not, strictly speaking, ‘waive’ their claims. Rather, defendants who fail to object to an error below forfeit the right to obtain appellate

relief unless they prove that fundamental error occurred."); *State v. McLemore*, 288 P.3d 775, 780 n. 10 (Ariz. App. 2012) ("For purposes of clarity, we refer to the failure to properly assert the right to self-representation as forfeiture rather than waiver.").

At the request of this Court, the Arizona Supreme Court examined Rule 32.2(a)(3) in *Stewart v. Smith*, 46 P.3d 1067 (2002), and therein explained that different waiver analyses apply to different types of constitutional claims:

The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must 'knowingly, voluntarily and intelligently' not raise an issue at trial, on appeal, or in a previous collateral proceeding before the issue was precluded. *See, Faye v. Noya*, 372 U.S. 392 (1963). While that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors. Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved.

...

For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim.

Smith, 46 P. 3d at 1070-71 ¶¶ 8-9 (emphasis added).

The waiver at issue in Rule 32.2(a)(3) pertains to *successive* proceedings and may not be invoked when the *first* petition for postconviction relief is under review. Barber raised claims of deprivation of constitutional protections in the designated forum and the state court denied him procedural due process in finding his non-IAC claims precluded, even though the claims were raised in his

first postconviction relief petition. Not only are “[s]tate and federal courts are ‘equally bound to guard and protect rights secured by the constitution,’ ” *Ex parte Royall*, 117 U.S. 241, 251 (1886), but *Townsend v. Sain*, 372 U.S. 293, 308-09 (1963), requires judicial review if a petitioner challenges a conviction on constitutional grounds. Arizona provides for that review in its statutes, procedural rules, and in its case law. *State v. Richmond*, 560 P.2d 41, 49 (Ariz. 1976) (adopting *Townsend*); *State v. Watson*, 559 P.2d 121, 135, (Ariz. 1976) (same); Ariz. R. Crim. P. 32.11(a)-(b) (directing the state court to schedule a hearing if claims present material issue of fact or law that would entitle the defendant to relief); A.R.S. § 13-4231.

Invoking Rule 32.2(a)(3) without conducting the required analysis systematically deprives petitioners of procedural due process

Even if a defendant fails to object to trial error, Arizona has adopted the principle that “[a]n exception to the waiver principle exists in the doctrine of fundamental error.” *State v. Valdez*, 770 P.2d 313, 318 (Ariz. 1989). Arizona has not abandoned that principle and continues to provide for fundamental error review in its case law and in Rule 32.2(a)(3) itself which provides that the rule of preclusion does not apply when “the claim raises a violation of a constitutional right that can only be waived knowingly, voluntarily, and personally by the defendant.” Ariz. R. Crim. P. 32.2(a)(3); *State v. Escalante*, 425 P.3d 1078, 1085 ¶ 21 (Ariz. 2018); *State v. Gendron*, 812 P.2d 626, 628 (Ariz. 1991).

Arizona petitioners are systematically being deprived of the right to collateral review and intervention by this Court is warranted

Review of only ineffective assistance of counsel claims on collateral review deprives petitioners of procedural due process as Rule 31 does not direct petitioners to raise constitutional claims on direct review and Rule 32.1(a), does not place any limit on the categories of constitutional claims a petitioner may raise in his first petition for collateral review. State procedural vehicles are systematically inadequate to vindicate constitutional rights when the preclusion doctrine is used to bar review of federal claims that *could* have been raised on direct appeal but could *also* be raised in postconviction relief proceedings. This Court should grant the petition for a writ of certiorari as the local requirement that all constitutional claims, except IAC claims, must be raised on direct appeal is not codified in the supreme court rule governing direct appeal or in A.R.S. § 13-4033(A)(1). The local practice deprives defendants of the ability to seek full vindication of their federal constitutional rights in state courts, and is in conflict with this Court's clear directives in *Kindler*, *Lee*, *Massaro*, *Schneckloth*, *Carter*, *Ex parte Royall*, *Townsend*, and *Martinez*.

II

The wrongful application of the preclusion doctrine in the state courts of Arizona bars review of constitutional claims in federal courts.

As set forth above, a finding of preclusion bars federal review under the independent and adequate state ground doctrine, *Coleman*, 501 U.S. at 729, and

this Court has directly concluded that Arizona's Rule 32.2(a)(3) is an independent and adequate state ground that bars federal habeas review of constitutional claims. *Smith*, 536 U.S. at 861.

The invocation of the preclusion doctrine against Arizona's non-capital defendants in state courts is a denial of due process and access to the courts, as preclusion results in petitioners being denied of the opportunity to litigate their federal constitutional rights in any forum. *See Christopher v. Harbury*, 536 U.S. 403, 415 n. 12 (2002) ("Decisions of this Court grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses.") (internal citations omitted).

Barber complied with state statutes and state procedural rules and raised constitutional claims for relief in the "right tribunal at the right time." Yet, under *Coleman* and *Smith*, he would be barred from obtaining federal review on the claims raised on collateral review as federal courts would conclude, from the state court order before this Court, that he had "prevent[ed] adjudication of his constitutional claims in state court." *Coleman*, 501 U.S. at 748. Further, under *Martinez Ramirez*, 596 U.S. at 381, *Cullen v. Pinholster*, 563 U. S. 170, 180 (2011), and *Harrington v. Richter*, 562 U. S. 86, 102-03 (2011), he could not develop the record in federal court.

Petitioners are not appointed counsel in habeas corpus proceedings unless a certificate of appealability is granted, and the onus would be on them to overcome the cause and prejudice standard or demonstrate a fundamental miscarriage of justice—in a proceeding Justice Blackmun has categorized as “a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights.” *Coleman*, 501 U.S. at 758-59 (Blackmun, J., dissenting). The inadequacy of state procedural vehicles to vindicate constitutional rights is brought into sharp relief when one considers that Arizona has closed prison libraries pursuant to *Lewis v. Casey*, 516 U.S. 804 (1996), and made only non-annotated statutes and procedural rules available to the incarcerated.⁷ The state courts’ reliance on case law instead of the express provision of the statute and state procedural rules further deprives petitioners of due process, as the incarcerated do not have access to case law.

A non-capital defendant, such as Barber, who raised constitutional claims on collateral review could not invoke the “narrow exception” this Court recognized in *Martinez Ramirez*, 596 U.S. at 380. This is because the state court order conveys to the federal court that he was required to raise his constitutional claims on direct appeal when that was not the case, as made plain in A.R.S. § 13-4033(A)(1), Rule 31 (direct appeal), *Smith*, *Carriger I*, and *Soto*. *See also Noia*, 372 U.S. at 430 (on direct appellate review of a state court judgment, the

⁷ See *Inmate Legal Access to the Courts, Department Order 902*, Arizona Department of Corrections Rehabilitation and Reentry (2023). Available at <https://corrections.az.gov/department-orders-policy>

Supreme Court “is concerned only with the judgments or decrees of state courts.”).

The state courts in Arizona are not taking “the opportunity to pass upon and correct alleged violations of prisoners’ federal rights,” as *Martinez Ramirez* envisions. Shortly after the Arizona Supreme Court revised its collateral review procedural rules in 1992, the court of appeals curtailed the practice of conducting independent reviews and issuing opinions in collateral review cases. *State v. Whipple*, 866 P.2d 1358, 1359 (Ariz. App. 1993). The court of appeals reasoned that summary orders denying relief are appropriate in cases where the trial court clearly and correctly articulated its ruling and the ruling would not complicate further review in state or federal court. *Id.* The appellate court assumed that the federal courts would conduct the required review:

Some concern has been raised over the years that denying relief by summary order might create confusion about whether a procedural default has occurred in the post-conviction relief proceeding, which would preclude federal habeas corpus review. Whatever validity there once may have been to this argument is now gone. Under *Ylst* and *Coleman* the federal courts will ‘presume that no procedural default has been invoked’ when an unexplained order leaves in place an earlier decision on the merits.

866 P.2d at 1360. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991) (“[W]here, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.”)

However, Congress amended the habeas corpus statute in 1996⁸ and this Court has made clear that federal claims are to be adjudicated in state courts in the first instance. *Martinez Ramirez*, *Pinholster*, and *Richter* call into question whether a federal judge has a duty to “ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds,” *Coleman*, 501 U.S. at 736, as the federal court must now solely rely on the state court record before it.

The state courts of Arizona have not adapted to these changing legal mandates. Despite the expectations of the state court of appeals, the federal constitutional claims of non-capital defendants are routinely precluded, and thereafter, federal review is foreclosed under the independent and adequate state ground doctrine.

The anomalies in Rule 32.2 have always been apparent and this Court itself certified a question to the Arizona Supreme Court concerning the proper interpretation of Rule 32.2(a)(3). *Smith*, 536 U.S. at 856. Responding to the inquiry, the Arizona Supreme Court expressly disapproved of the holdings of *State v. French*, 7 P.3d 128 (Ariz. App. 2000) and *State v. Curtis*, 912 P.2d 1341 (Ariz. App. 1995), wherein two separate divisions of the state’s lower appellate courts had held the question whether an asserted claim was of “sufficient constitutional magnitude” to require a knowing, voluntary, and intelligent waiver

⁸ *Antiterrorism and Effective Death Penalty Act of 1996* (AEDPA), Public Law 104–132—APR. 24, 1996.

for purposes of Rule 32.2(a)(3) depended on the merits of the particular claim. *Smith*, 46 P. 3d at 1071 ¶ 10.

In *Ceja*, the Ninth Circuit noted that the prosecution and the judiciary inconsistently applied the rule of preclusion. The lower courts had rejected some of the claims of the capital defendant on the basis of procedural default and the Ninth Circuit chronicled that the prosecution proffered preclusion and waiver arguments interchangeably:

In Ceja's second Rule 32 proceeding, the trial court rejected his claims "for the reasons stated in Response to Petitioner's Petition for Post Conviction Relief...." In that brief, Arizona argued inconsistently that claims 1-3, 5-7, 11 were previously reviewed on the merits and waived: "[A]ll of petitioner's grounds are precluded because petitioner either knowingly, intelligently and voluntarily withheld them on direct appeal or his previous Rule 32 proceeding, or they have been previously determined against petitioner's position on the merits." The Arizona Supreme Court denied review.

...
By adopting Arizona's mixed arguments of preclusion and waiver with respect to these claims, the state court in Ceja's second Rule 32 proceeding did not clearly base its decision on independent and adequate state law grounds.

97 F.3d at 1252-53.

As the Ninth Circuit has remarked, a claim cannot be both previously litigated and procedurally defaulted:

A claim cannot be both previously litigated and procedurally defaulted; *either it was raised in a prior proceeding or it was not*. These cases do not allow for the possibility that the state court relied on both grounds for dismissing the relevant claims; only one ground could apply to each claim. The question is not whether the state relied primarily on a particular

ground, but on which mutually exclusive ground the state court relied. When either ground is a possibility, the choice between them is wholly arbitrary. It is not our role to make such a choice.

Koerner v. Grigas, 328 F.3d 1039, 1053 (9th Cir. 2003) (emphasis added).

In *Poland*, the Ninth Circuit found itself in the position of divining Arizona's distinction between waiver and preclusion through different iterations of Rule 32.2:

A claim that has been found to be 'precluded' under subsection (a)(2) appears to be a classic exhausted claim and may therefore be subject to consideration in federal habeas.... In contrast, a claim that has been 'waived' under subsection (a)(3) is procedurally defaulted and therefore barred from federal court consideration, absent a showing of cause and prejudice or fundamental miscarriage of justice.

With the distinction between "waiver" and "preclusion" in mind, we turn to an analysis of the effect of the two PCR orders in the present case.

169 F.3d at 578.

In 1998, the Ninth Circuit had cause to certify Rule 32 interpretive questions to the Arizona Supreme Court in *Moreno*. One certified question asked the Arizona Supreme Court to evaluate whether a petitioner was barred from presenting his claims to state courts at a particular point in time. 962 P.2d at 206 ¶¶ 2-3. The second certified question asked the Arizona Supreme Court to determine whether a different petitioner could still present two of his claims to state courts. *Id.* at 206-07 ¶¶ 4-6.

In a recent habeas corpus proceeding, a magistrate judge documented the work-around Arizona petitioners employ to satisfy AEDPA's exhaustion requirement:

The undersigned acknowledges the anomaly that results from Arizona's rules and the state courts' habit of invoking both parts of Rule 32.2(a) without differentiation. An Arizona defendant can fail to properly exhaust claims on direct appeal (by failing to raise them) and/or in his first PCR proceeding (e.g. by failing to seek appellate review), but end up exhausting them by bringing a second PCR proceeding, again raising the claims, and having them rejected under Rule 32.2(a)(2) as precluded because previously "adjudicated on the merits." Thus, the petitioner can effectively exhaust his state remedies without ever actually fairly presenting the claim to the Arizona appellate courts. Arizona could avoid this anomaly but eliminating the "finally adjudicated on the merits" requirement in Rule 32.2(a)(2), and simply bar claims that have been, for example, "finally adjudicated" in a prior proceeding. In such an instance, no finding of a merits resolution would result. Nor would PCR courts be left in the anomalous position of having to declare claims determined in an earlier PCR proceeding to have been waived, as having been "adjudicated on the merits" to avoid having to revisit them. But despite the decades since *Ceja* and related cases, Arizona has not chosen to do so.

Report and Recommendation, CV-17-1834-PHX-DWL (JFM), (D. Ariz. Sept. 30, 2020), Doc. 125 at 34 n. 21.

Arizona has not heeded the call of the federal judiciary to address the troubling anomalies in its rule of preclusion and, in other circumstances, has noted it is not bound by the Ninth Circuit's interpretation of what the Constitution requires. *State v. Montano*, 77 P.3d 1246, 1247 n. 1 (Ariz. 2003); *State v. Vickers*, 768 P.2d 1177, 1188 n. 2 (Ariz. 1989); *State v. Escareno-Meraz*,

307 P.3d 1013, 1014 ¶ 6 (Ariz. App. 2013) (determining that *Martinez v. Ryan* 566 U. S. 1 (2012) did not alter established Arizona law and, did not provide a basis for relief pursuant to Rule 32.1(g).)

The Arizona Supreme Court *has* grappled with the anomalies created by its restructuring of Rule 32 in 1992, but its tweaks are not enough to permit non-capital petitioners to vindicate constitutional rights in state courts. At one time, the Arizona Supreme Court required that all claims for postconviction relief be consolidated in one petition. *See Ariz. R. Crim. P. 32.5* (1998) (requiring PCR petition to “include every ground known to him or her for vacating, reducing, correcting or otherwise changing all judgments or sentences imposed on him or her”); *see generally, State v. Vasquez*, 690 P.2d 1240, 1243 (Ariz. App. 1984) (“One of the clear purposes of Rule 32.5(b) is to provide for appointment of counsel so that all grounds for relief may be included in one petition.”)

The “One PCR Petition” rule proved unworkable and in 2013, the Arizona Supreme Court amended the Rules of Criminal Procedure to delete the restriction. *See Arizona Supreme Court Administrative Order Number R-13-0009* Amending Rules 32.5 and 41, Form 25, Arizona Rules of Criminal Procedure (2013). In 2000, the Arizona Supreme Court added “actual innocence” as a ground of relief that could be raised in a successive petition. *See Ariz. R. Crim. P. 32.1(h), 32.2(b), & 32.4(a)* (2001). In 2020, the Arizona Supreme Court substantively overhauled its rules governing post-conviction review. *See Rules of Criminal Procedure Arizona Supreme Court Order Number R-19-0012* (Aug. 29, 2019),

effective January 1, 2020, abrogating current Rule 32 of the Arizona Rules of Criminal Procedure and adopting new Rule 32 and Rule 33 and related provisions.)⁹

Categorizing its Rule 32 jurisprudence as “murky,” the Arizona Supreme Court decreed, in 2002, that ineffective assistance of counsel claims would no longer be considered on direct appeal and that all such claims must be raised in Rule 32 proceedings. *State v. Spreitz*, 39 P.3d 525, 527 (Ariz. 2002). The Arizona Supreme Court previously directed petitioners to raise ineffective assistance of counsel claims in Rule 32 petitions during the pendency of direct appeals and thereafter to move to stay the direct appeal. *Valdez*, 770 P.2d at 319.

In 1995, however, the Arizona Supreme Court abandoned the practice of staying direct appeals pending resolution of Rule 32 proceedings in capital cases. *Krone*, 890 P.2d at 1151-52. The Arizona Supreme Court explained that the practice of staying appeals pending resolution of Rule 32 proceedings had proven unsuccessful and that it would no longer issue such stays barring the most exceptional circumstances. *Id.* The Arizona Supreme Court recognized that its new practice was inconsistent with its prior directives but did not require uniformity of state procedural practices:

We are aware that our present practice may appear to conflict with the practice suggested by cases starting with *State v. Valdez*, 160 Ariz. 9, 770 P.2d 313 (1989). In *Valdez*, we said:

⁹ Available at <https://www.azcourts.gov/rules/Recent-Amendments/Rules-of-Criminal-Procedure> (last visited on October 12, 2023).

As a general matter, we recommend that when a defendant wishes to raise the question of ineffective assistance during the pendency of his appeal, he should file the proper petition under Rule 32 ... in the trial court and seek an order from the appellate court suspending the appeal.

160 Ariz. at 15, 770 P.2d at 319; *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). We continue to commend the Rule 32 process to resolve claims of ineffective assistance of counsel. *See State v. Atwood*, 171 Ariz. 576, 599, 832 P.2d 593, 616 (1992) [...].

Krone, 890 P.2d at 1151 (parenthetical citation omitted).

In 2006, the Arizona Supreme Court had cause to clarify that an attorney cannot allege her own ineffectiveness and therefore the rule of preclusion does not bar a petitioner from filing a successive Rule 32 petition contesting the ineffective of counsel who represented her on both direct appeal and collateral review. *Bennett*, 146 P.3d at 67 ¶¶ 14-15. The postconviction court and the lower appellate court had applied the rule of preclusion. *Id.* at 66 ¶¶ 11-12.

The unintended consequence of the failure to directly specify, in an amendment to Rule 32.1 or an opinion, that constitutional claims may be raised on both direct appeal and collateral review, is foreclosure of review in federal courts.

Barber's claims cannot be precluded as he is litigating them in his first collateral review petition. Incongruously, the court of appeals summarily held that it is the petitioner's burden to show that the state court abused its discretion by denying the petition for postconviction relief, and Barber had failed to show an

abuse of discretion. (Pet. App. 8a.) Although it cited *State v. Gutierrez*, 278 P.3d 1276 (2012), the court of appeals did not conduct the required *de novo* review of claims contesting the interpretation of criminal procedure and alleging deprivation of constitutional rights. *Gutierrez*, expressly specifies that “[i]ssues involving the interpretation of constitutional law, statutory construction, and court rules are reviewed *de novo*.” 278 P.3d at 1280 ¶ 19; *accord*, *Fitzgerald v. Myers*, 402 P.3d 442, 446 ¶ 8 (Ariz. 2017) (“Because the issues here turn on statutory and rule interpretation, our review is *de novo*.”). *See generally*, *State v. Swoopes*, 166 P.3d 945, 948 ¶ 4 (Ariz. App. 2007) (“[W]e are not bound by a court’s legal ruling on the issue of preclusion in post-conviction proceedings.”)

On December 15, 2022, the day the Arizona Court of Appeals issued its order affirming the trial court judgment, it issued identical orders in five other petitions for review from collateral review proceedings.¹⁰ During the 2022 fiscal year, 732 petitioners filed collateral review petitions in Maricopa County, Arizona.¹¹ Maricopa County Superior Court issued adjudicatory orders terminating 913 postconviction relief petitions during that fiscal year. *Id.*

¹⁰ See *State v. Longhini*, 1 CA-CR 22-0089-PRPC (Ariz. App. Dec. 15, 2022) (Mem. Decision); *State v. Grimes*, 1 CA-CR 22-0033-PRPC (Ariz. App. Dec. 15, 2022) (Mem. Decision); *State v. Chala*, 1 CA-CR 22-0099-PRPC (Ariz. App. Dec. 15, 2022) (Mem. Decision); *State v. Berry*, 1 CA-CR 22-0109-PRPC (Ariz. App. Dec. 15, 2022) (Mem. Decision); *State v. Apodaca*, 1 CA-CR 22-0214-PRPC (Ariz. App. Dec. 15, 2022) (Mem. Decision).

¹¹ See *Maricopa County Annual Report of Operations; Fiscal Year 2022*, Annual Reports, the Judicial Branch of Arizona in Maricopa County, Appendix A - (continued ...)

In a recent collateral review proceeding where the court of appeals could have directly affirmed that constitutional claims may be raised in a first petition on collateral review, it side-stepped the issue:

We assume, without deciding, that Macias could raise the juror misconduct claim in his first timely filed Rule 32 petition. *But cf. State v. Kolmann*, 239 Ariz. 157, 163, ¶ 25, 367 P.3d 61, 67 (2016) (holding that because the juror-misconduct claim, in that case, could have been raised in a post-trial motion under Rule 24, the defendant was precluded from raising it in the post-conviction petition).

State v. Macias, 469 P.3d 472, 476 ¶ 9 (Ariz. App. 2020).

Arizona is not giving non-capital defendants the opportunity to develop the state court record in the state court as this Court requires. *Martinez Ramirez*, 596 U.S. at 378-79. In fact, state courts are improperly declining to address federal constitutional claims, and the resultant court orders detrimentally convey that a petitioner has “failed to meet a state procedural requirement.” *Coleman*, 501 U.S. at 729-30.

In effect, non-capital defendants in Arizona are being denied access to the courts though a local practice that is divorced from its statutes and procedural rules. As the capital defendant contended in *Cruz v. Arizona*:

The Supremacy Clause does not permit a state to consider constitutional claims in its postconviction proceedings and then to close those proceedings to

(... continued)

Criminal Department at 60. Available at <https://superiorcourt.maricopa.gov> > annual-reports.

exactly the kind of claim that federal law requires courts to consider.

Cruz v. Arizona, No. 21-486 Petition for Certiorari, (filed Nov. 22, 2021). Absent intervention by this Court, Barber, and similarly situated non-capital defendants, cannot vindicate federal constitutional rights in the designated state court forum.

Conclusion

Rule 32.1(a) and Arizona Revised Statute § 13-4231(1) accord Arizona petitioners the right to litigate constitutional claims in their first collateral review petition. Without the context provided in this petition, Barber could not demonstrate to federal courts that “Arizona has become inconsistent and irregular in its reliance on Rule 32.2(a)(3).” *Ortiz*, 149 F.3d at 931-32. In point of fact, the court orders, required to accompany this petition, convey that Barber had “fail[ed] to raise federal claim[s] in compliance with state procedures.” *Martinez Ramirez*, 596 U.S. at 378. The local practices that have developed since Rule 32.2 was amended in 1992 have deprived countless defendants of the opportunity to vindicate their federal constitutional claims in state courts. The independent and adequate state ground doctrine then forecloses review in federal courts. This Court should grant Barber’s petition for a writ of certiorari to redress these systemic deprivation of procedural due process.

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Respectfully submitted

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