

# How *SPECIAL* is your *ACTION?*

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## What IS a Special Action ?

- Type of speedy, limited appellate review  
Of non-final (*interlocutory*) rulings made in  
superior, justice, or municipal courts.
- Referred to as "EXTRAORDINARY WRIT"  
because only **extraordinary** circumstances  
warrant relief

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## Two Types of SAs

- **Simply called "Special Action"**  
Discretionary review
- **Statutory Special Action:**  
Statute creates a right to "appeal" an issue;  
Mandatory jurisdiction;  
e.g. ARS § 13-752: Intellectual Disability/Capital Δ  
Within 10 days of ruling, either side may file SA  
COA "shall" exercise jurisdiction and decide merits

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## Only One Prerequisite

### Rule 1 – Rules of Procedure Special Action (RPSA)

Special Action Relief is appropriate ONLY if there is

**NO**

**EQUALLY**

**PLAIN,**

**SPEEDY, or**

**ADEQUATE**

**REMEDY BY APPEAL**

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## What's the Difference?

### STATE'S APPEAL:

- § 13-4032 limits appeal to 7 enumerated issues
- Appellate Jurisdiction: Mandatory
- Complete Record goes up
- Ariz. R. Crim. P. govern
- Time Consuming

### SPECIAL ACTION

- Any issue not covered by statute
- Appellate Jurisdiction: Highly Discretionary
- Limited Record
- Rules of Procedure for Special Action (RPSA)
- Rules of Civil Appellate Procedure (ARCAP)
- Quick Turn-around

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## What can the State appeal under § 13-4032?

*Two most common causing confusion – appeal or SA?*

(6) Order suppressing evidence → constitutional grounds  
*See State v. Bejarano, 219 Ariz. 518 (App. 2008)*

(5) Illegal sentence → not authorized by statute  
*See State v. Bermini, 230 Ariz. 223 (App. 2012); State ex rel McDougall v Crawford, 159 Ariz. 339 (App. 1989)*

- (1) Order dismissing indictment, complaint, or count
- (2) Order granting new trial
- (3) Adverse ruling on question of law when Δ appeals
- (4) Order made after judgment affecting substantial rights of the State or Victim-by V's request
- (7) Judgment of acquittal entered after guilty verdict

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## Questions Raised Rule 3(a) – part one

Whether RJ has failed to exercise discretion which he has a duty to exercise

MANDAMUS: compel performance of a discretionary act  
- no requirement that discretion be exercised in a particular manner,  
but only that discretion is exercised.

Example: RJ fails to act on Δ's motion under Rule 13.4(b),  
severance as a matter of right.

Licensing board has discretion to deny license but may  
not delay decision for an extended period of time.

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## Questions Raised Rule 3(a) – part two

Whether RJ has failed to perform a duty required by law as  
to which he has no discretion

MANDAMUS: compel performance of a mandatory duty

Examples:

- Refusal to transfer case upon timely filed Rule 10.2 or  
17.4(g) motion for change of judge;
- Enforce Rule 32.4 – assign PCR to sentencing judge if possible
- Refusal to give Δ opportunity to withdraw plea if court  
rejects agreement or any part of agreement.

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## Questions Raised Rule 3(b)

Whether RJ has proceeded ← *certiorari*  
or is threatening to proceed ← *prohibition*  
without or in excess of jurisdiction or legal authority.

Examples:

- clear statute of limitation violation (w/o jurisdiction)
- proceeding under wrong venue (w/o jurisdiction)
- grants untimely Rule 12.9 motion (w/o legal authority)
- orders V to submit to defense interview (w/o authority)

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## Rule 3(a) and (b)

Rule 3(a) compels performance of some act  
Rule 3(b) prohibits acting without authority  
*Don't limit your argument to "abuse of discretion" standard*

Pre-1970 case law still applies – can be used as authority.

Rule 3(a) and (b) provide "brighter line" standards  
and more likely to get review

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## Questions Raised Rule 3(c)

Whether RJ's decision was arbitrary and capricious or  
an abuse of discretion.

What is *judicial discretion*?

*"it is the power of decision,  
exercised to the necessary end of awarding justice,  
based upon reason and law,  
but for which decision there is no special governing  
statute or rule."*

*Santanello v. Cooper*, 12 Ariz. App. 123, 468 P.2d 390 (App. 1970),  
*vacated on other grounds*, 106 Ariz. 262, 475 P.2d 246 (1970).

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## Rule 3(c)

What is an abuse of discretion:

- a clear absence of evidence to support the trial court's actions;
- decision is manifestly unreasonable, legally incorrect, exercised on untenable grounds or for untenable reasons

What is NOT abuse of discretion:

- where any reasonable view of the facts and law might support the judgment of the trial court.



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## Rule 3(c)

Abuse of Discretion Standard → affords WIDE latitude

Majority of issues will fall under Rule 3(c)

Use your *objective, professional judgment* to assess ruling

"I disagree with the ruling" → not enough for SA

Even if WRONG, the harm must be clear & urgent  
e.g. -Preclusion of crucial evidence/testimony  
-jury instruction clearly misstates the law

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## "SPECIAL" FACTORS

Statewide Importance –  
has broad impact on the practice of criminal law, not just your case

Substantial Public Importance –  
involves public policy considerations

Issue of 1<sup>st</sup> impression-  
no AZ case law on point

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## "SPECIAL" FACTORS

Pure legal questions -  
interpretation of constitution, statute, or rule

e.g. Victim's Bill of Rights  
ever-changing DUI laws  
impact of AMMA (med mj) on DUI law  
New Evidence Rule 702/*Daubert*

Issues likely to arise again:  
inconsistent rulings

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### “SPECIAL” FACTORS

More factors = more likely court will accept  
SA jurisdiction & grant relief

*PRACTICE TIP:*

- Do not simply recite a litany of factors;
- Back up with detailed, solid reasons;
- Explain policy considerations in detail;
- Point to evidence of how widespread the

problem is;

- Attach copies of inconsistent ruling on

same issue.

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### Common Issues:

Constitutional/statutory/rule interpretation

*Victim Rights issues*

Bail/Pretrial detention

*Probable Cause/Grand Jury remand findings*

Questioning of Jurors – grand or petite

*Right to Jury Trial; number of jurors*

Disclosure/Discovery/Sanctions

*Incorrect Jury Instructions*

Assertion of Privilege

*Plea Agreement challenges*

Appointment or Disqualification of Counsel

– prosecutor or defense attorney

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### Potential Issues:

#### *Evidentiary Rulings:*

NO: if evidence **suppressed** on constitutional grounds

*e.g: 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> Amendment*

*because have right to appeal under § 13-4032(6)*

YES: if evidence **precluded** on non-constitutional grounds

*e.g: evidentiary reason; as disclosure sanction, etc.*

#### **Rule 3(c): Abuse of Discretion Standard**

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**Potential Issues:**

**Sentencing Rulings:**

YES: - strike State's enhancement/aggravation allegations  
 - finding of not committed on "same occasion"

NO: - illegal sentence:  
 - sentence not authorized by statute, or  
 - imposed in illegal manner  
 = Appealable under § 13-4032(5)

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**TIME TO FILE**  
(non-emergency)



RPSA: impose no time limit to file a SA Petition

LACHES: may be the only restriction on untimely filing

*"Arizona courts have repeatedly found laches to be the only restriction on the time for filing a petition for special action."  
 State ex rel. McDougall v. Teedt, 163 Ariz. 281 (App. 1989)*

Equitable remedy for **unreasonable** delay resulting in **actual prejudice** to the adverse party. *Harris v. Purcell, 193 Ariz. 409 (1998).*

*Undue delay = undermines claim that your issue is "special"*

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**TIME TO FILE**  
(non-emergency)



BEWARE of

*State v. Mahoney, 25 Ariz. App. 217 (App. 1975):*  
 When a criminal prosecution is dismissed, the 20-day time period for taking an appeal applies to the State's SA.

*Since then, an order dismissing an indictment is appealable under ARS 13-4032(1)*

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## Stay of Proceedings

### Rule 5

#### WHEN NEEDED ?

- deadline approaching (contested disclosure)
- firm trial date on near horizon (6 weeks or less)
- jury empaneled & jeopardy attached (emergency)

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## Stay of Proceedings

#### CRITERIA: same as Rule 65, Ariz. R. Civ. P., Injunctions

- strong likelihood of success on merits  
*prima facie* showing only; will depend on how erroneous the ruling is;
- possibility of irreparable injury  
no other remedy can undo the damage
- balance of hardships weigh in Petitioner's favor  
stay will not deprive opposing party of any rights
- public policy favors the requested relief  
enforcement of constitutional rights is w/in AZ public policy

*Shoen v. Shoen*, 167 Ariz. 58, 804 P2d 787 (App. 1990)

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## Stay of Proceedings

#### PROCEDURE:

1. Must ask trial court first:
  - if granted, no further action need be taken;
  - if denied, get written order denying request.
2. File Stay Motion in Appellate Court
3. Arrange telephonic conference with Court and opposing counsel (follow Court's directions)

Know the facts & procedural history  
Be prepared to argue the merits of issue raised in SA

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## “Emergency” Action

Need to file mid-trial & TC denied your stay request

PROBLEM: Stay Motion + SA Petition must be filed simultaneously

Can't get relevant transcript(s) in time

SOLUTION:

- 1) File “bare bones” Petition, explain urgency
- 2) Attach affidavit(s) signed by prosecutor detailing facts and circumstances
- 3) Avow to file transcript(s) as soon as available




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## The PARTIES – Rule 2

PETITIONER = *Aggrieved Party seeking relief*  
 State of Arizona, *ex rel.* County Attorney  
 Defendant  
 Victim

RESPONDENT:  
 Judicial officer whose ruling is being challenged  
*If more than one: name all*  
 COA is w/o juris to grant relief against unnamed respondent.  
*Hickox v. Superior Court, 19 Ariz. App. 195 (App. 1973)*

REAL PARTY IN INTEREST = *Prevailing Party below*

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## The PARTIES – Rule 2

Respondent Judge:

- Has only nominal interest in the proceeding; generally no standing
- Real Party in Interest has justiciable stake; files Response

When RJ has Standing to Appear:

- Becomes issue when Petitioner & RPI agree on relief
- YES: “Defense-of-Policy” Response  
 RJ may defend the general validity of an underlying administrative practice, policy, or local rule.
- NO: “I-ruled-correctly” Response:  
 RJ may not assert validity of ruling on a particular issue.

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## The PARTIES

### INTERVENTION – Rule 2(b)

Intervener has actual interest in outcome & interests not adequately protected by existing parties.

*Rule 24, Az. R. Civ. P. govern*

### AMICUS CURIAE – Rule 7(f)

Has only general interest in outcome

*RPSA 7(f) and Rule 16, Az. R. Civ. App. P.*

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## The CAPTION

### Rule 4(e)

PARTY AGGRIEVED BELOW,  
Petitioner

v.

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

and

Prevailing Party Below,  
Real Party in Interest.

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## The PETITION

### Rule 7(e) - RPSA

No magic bullet or sure-fire method  
Make it clear, concise, and persuasive

#### I. Jurisdictional Statement should address:

##### a) Appellate court's subject matter jurisdiction:

This Court [court of appeals] is authorized to consider a  
Petition for Special Action under Art. 6, §§ 5 and 9, of the  
Arizona Constitution, ARS § 12-2021 *et seq.*, and Rules 1, 3, 4,  
and 7, Arizona Rules of Procedure for Special Actions.

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b) Explain why SA jurisdiction is appropriate:

While this Court's decision to exercise its special action jurisdiction is highly discretionary, *Haas v. Colosi*, 202 Ariz. 56, 57, ¶ 2, 40 P.3d 1249, 1250 (App. 2002), the State submits this Court should accept jurisdiction in this case for the following reasons.

- 1) **no equally plain, speedy, or adequate remedy by appeal.**  
The State has no right to appeal the Respondent Judge's decision to .....
- 2) Cite cases where SA juris has been granted on similar issue or point out no case on point.
- 3) Explain your "**special**" factors
  - issue of 1<sup>st</sup> impression; pure issue of law; etc.

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II. Statement of the Issue:

- keep it simple, clear, concise
- frame the issue under the relevant Rule 3 Question

III. Statement of Facts and Procedural Background:

- provide necessary background and facts
- do not overwhelm with extraneous information
- cite to the Record (*e.g.*, Appendix Item 1, at 4.)

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IV. Standard of Review:

- not required under Rule 7(e) but helpful
- *abuse of discretion*
- *de novo* review for:
  - constitutional and statutory interpretation
  - purely legal questions
- *deference to factual findings* if supported by record and not clearly erroneous

V. Argument:

- elaboration of arguments presented below
- must cite to authority and record (Appendix)

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VI. Conclusion:

- not required by Rule 7(e)
- but has more impact as separate section rather than appearing as last part of the argument.
- reiterate relief requested:  
accept jurisdiction and grant relief

Rule 7(e) Miscellaneous:

- copy of the decision from below must be attached to Petition, not included in Appendix
- 10,500 word limit
- double spaced; min 14 pt. proportional font
- Cert. of Compliance (Petition, Response, Reply)

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## Response to SA Petition

Follows same format as the Petition

Jurisdictional Statement:

- contradict claim of “no remedy by appeal”
- rebut “special” factors

Conclusion/Relief Requested:

- Deny jurisdiction
- but if jurisdiction accepted, deny relief

Appendix:

- include relevant items not supplied by Petitioner

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## What is “The Record”

**1. Anything said in open court on the record (transcript)**

- testimony
- arguments
- stipulations
- capture in-chambers discussions on the record:  
“Your honor, as I understand the conversation in chambers, you are saying \_\_\_\_\_.”

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## “The Record”

### 2. Anything filed with the court:

- pleadings, including motions & responses
- jury instructions
- court rulings (minute entries)
- presentence reports & recommendations
- exhibits

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## “The Record”

### 3. OFFER OF PROOF if evidence precluded w/o hearing:

- what the evidence is
- why you need it
- what it would have established
- present witnesses outside presence of jury
- make every legal argument you can

### 4. Motions for Reconsideration

- opportunity to get any “second thoughts” on the record

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## The Special Action “Record” = The Appendix

- Unlike on appeal, only items supplied by the parties
  - What’s necessary for appellate court to understand your issue
  - Must cite to the record in all SA pleadings
- Must contain copies of all relevant
  - motions & responses from both parties
  - written court rulings
  - exhibits proffered or admitted at any hearing
  - transcripts of any time issue was discussed on the record



It’s impossible to establish ABUSE OF DISCRETION on an inadequate record.

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## Where to File

Rule 4(a): ASC, COA, Superior Court

Rule 4(b) Venue:

- SA filed in Superior Court: in county where RJ sits.
- SA filed in COA that has territorial jurisdiction over county in which prosecution is brought

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## Where to File

Rule 7(b) Concurrent Jurisdiction:

- file in lowest level court (*e.g.*, COA not ASC)
- if file in higher court, must explain why
- direct filing in ASC permitted only under unusual circumstance
- COA can take SA jurisdiction in capital cases prior to sentencing
- denial of jurisdiction is not decision on merits, so can return to lower court to file SA

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## Further Review

### Rule 8

Jurisdiction denied: NO motion to reconsider

*See* Comment to Rule 8; Rule 22(d)(3) Az. R. Civ. App. P.

Jurisdiction accepted &

Relief denied/granted: YES motion to reconsider – 15 days

Rule 22(b), Az. R. Civ. App. P.

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## Further Review

### Rule 8

Rule 8(a) Review of Decision of Superior Ct by COA:

- by Appeal if remedy by that means exists  
ARS 12-2101
- by Special Action if no remedy by appeal

If in doubt, cite *Robinson v. Kay*, 225 Ariz. 191 (App. 2010)  
if lacking appellate jurisdiction, court may exercise discretion to accept SA jurisdiction.

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## COA to ASC - Review

### Rule 8(b)

Rule 8(b) Review of Decision of COA by ASC

- by "Petition for Review of a Special Action Decision of the Court of Appeal"
- new Special Action only when "exceptional circumstances" make petition for review inadequate.
- Motion for Stay or Expedited Review can be filed in ASC

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## COA to ASC - Review

Standards of Review:

- If jurisdiction was declined:
- declination order reviewed for abuse of discretion

- If jurisdiction accepted and merits addressed:
- abuse of discretion standard of review
  - deference to factual finding, viewed in light most favorable to sustaining those findings;
  - *de novo* on constitutional/statutory interpretation & legal issues

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## COA to ASC - Review

If ASC grants review, it may:

- consider and decide merits
- remand to court of appeals
- make "other dispositions"

*Rule 23(i), Az. R. Civ. App. P.*

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## ASC Reconsideration

### Rule 9

When ASC accepts jurisdiction & issue merits decision:

If decision states that it becomes effective or mandate shall issue immediately = final decision; NO motion for recon.

If decision states that it will be effective after mandate issues = motion for recon may be filed w/in 15 days.

Response to Motion for Recon: due 15 days after service.

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## The End



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