



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. PHIL OSUNA GUTIERREZ  
CR-11-0314-PR**

**PARTIES:**

*Petitioner:* Defendant Phil Osuna Gutierrez

*Respondent:* The State of Arizona

**FACTS:**

In 2000, Gutierrez was tried on a charge of second-degree murder in connection with his involvement in a drive-by shooting. His defense was that a codefendant had done the shooting. A jury convicted him of the offense, and his conviction was affirmed on appeal in 2001.

In 2007, Gutierrez asked for and was granted a court order requiring DNA testing of, among other things, a hat similar to the one a witness described as worn by the shooter. Testing showed that a hair found in the hat belonged to a codefendant, and that Gutierrez did not contribute to the sweat found on the hat band.

Based on these test results, Gutierrez filed a petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. Although the rules limit the issues that can be raised in post-conviction relief proceedings, Gutierrez claimed two exceptions applied to his case. First, a defendant may seek post-conviction relief if (1) new material facts were discovered after trial, (2) the defendant acted promptly in securing the new material facts, and (3) the facts do not simply prove the same point as other evidence already in the record. Rule 32.1(e), Arizona Rules of Criminal Procedure. Second, post conviction relief may be available if the defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be enough to show that no reasonable judge or juror would have found the defendant guilty of the underlying offense beyond a reasonable doubt. Rule 32.1(h), Arizona Rules of Criminal Procedure.

In addition to these rule provisions, Gutierrez also cited Arizona Revised Statute §13-4240(K), which says that, “[n]otwithstanding any other provision of law that would bar a hearing as untimely, if the results of the postconviction [DNA] testing are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to this article or the Arizona Rules of Criminal Procedure.”

Despite the provision of § 13-4240(K), the superior court judge did not hold an evidentiary hearing because he assumed the parties stipulated that no evidentiary hearing was needed. In his petition for post-conviction relief, Gutierrez argues the judge was mistaken, and that the only stipulation was about what evidence would be admitted at a hearing. The judge considering Gutierrez’s petition denied post-conviction relief, refusing to grant a new evidentiary

hearing because, even if a hearing had been held regarding the DNA testing and the DNA test results had been admitted as newly discovered evidence,

at best it would only show that defendant did not wear the cap. The petition [for post-conviction relief] fails to explain how that would change anything. [That] the state argued that [Gutierrez] was in fact the shooter is only part of the record as noted by the trial judge[']s decision to include an accomplice liability instruction. The jury . . . considered the evidence, including the ostensible flaws in the state's theory, and found beyond a reasonable doubt that the defendant was culpable.

Finding any failure to obtain and introduce DNA evidence was not harmful to Gutierrez's case, the court denied relief. Gutierrez the court of appeals to review his case. The court of appeals denied review without explanation.

#### **ISSUES:**

1. Did the superior court err in denying an evidentiary hearing?
2. Did the superior court err in denying relief under Rule 32.1(h) without examining the merits of Gutierrez's actual innocence claim?
3. Did the superior court err in denying Gutierrez's Rule 32.1(e) claim?

#### **DEFINITIONS:**

##### *Post-conviction relief:*

Post-conviction relief is provided for in Rule 32, Arizona Rules of Criminal Procedure. That rule permits a defendant to request that a criminal conviction be corrected or vacated, even after the conviction has become final on appeal, under limited circumstances and for certain reasons listed in Rule 32.1. Rule 32.4 requires that a petition for post-conviction relief be timely filed, except that certain claims, including those Gutierrez raises in this case, may be raised anytime.

*This Summary was prepared by the Arizona Supreme Court Staff Attorneys' Office solely for educational purposes. It should not be considered official commentary by the Court or any member thereof or part of any brief, memorandum, or other pleading filed in this case.*