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IN THE ARIZONA SUPREME COURT

In the Matter of, PETITION TO AMEND RULES 31.2, 31.4, 31.13, 32.4, AND 32.9 ARIZONA RULES OF CRIMINAL PROCEDURE	ARIZONA SUPREME COURT No. R-14-0010 INITIAL COMMENTS TO PETITION TO AMEND RULES

The Arizona Attorney General's Office proposes several amendments to the Arizona Rules of Criminal Procedure. Arizona has already experimented with the changes Petitioner now proposes. This Court ended that experiment almost twenty years ago. For the reasons described herein, Arizona should not return to an unworkable system, but should continue to improve the system of appellate and post-conviction review it has developed through years of experience.

Introduction

Petitioner proposes amendments to Arizona Rules of Criminal Procedure 31 and 32 to alter the process for reviewing capital cases. The proposed amendments would reorder the post-conviction relief ("PCR") and direct appeal proceedings in capital cases, requiring that PCR proceedings occur before the direct appeal. Following resolution of the PCR petition in superior court, this Court would conduct a consolidated review of appellate and PCR issues ("unitary review"). The proposed amendments carry the risk of exacerbating the very problems Petitioner purports they solve. What is more, experiences from other jurisdictions counsel against the proposed amendments.

At heart, rather than resolving the issues Petitioner identifies, the proposed amendments are an attempt to avoid the application of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), a United States Supreme Court case designed to preserve the constitutional rights of defendants. (*See* Pet. at 10-11.) Petitioner advocates the proposed amendments to avoid application of *Martinez* in federal habeas corpus cases. This is an inappropriate reason to seek to upend Arizona's well-established system of capital review, and it does not address issues relevant to state court review at any level. *See State v. Escareno-Meraz*, 232 Ariz. 568, 587, 307 P.3d 1013, 1014 (Ct. App. 2013) ("*Martinez* does not alter established Arizona law.").

The purpose of review in capital cases is to ensure justice and that criminal proceedings do not violate defendants' constitutional rights. *See State v. Bible*, 175

Ariz. 549, 609, 858 P.2d 1152, 1212 (1993) ("[W]ith the death penalty, we have taken, and should continue to take, the extra step–indeed walk the extra mile–to ensure fairness and accuracy in criminal cases"); *see also Zant v. Stephens*, 462 U.S. 862, 884-85 (1983) ("[T]here is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (internal quotation omitted)). The intent to protect or effectuate these principles is absent from Petitioner's attempt to overhaul Arizona's review of capital cases.

In short, the proposed amendments elevate speed over accuracy, purporting to speed-up the PCR process by shortening deadlines and attempting to insulate the work of ineffective PCR counsel from federal review. What is more, the proposed amendments will increase rather than decrease the complexity, costs, and delays of capital review. For these reasons, the Court should deny Petitioner's proposal.

I. The Proposed Amendments Fail to Address the Problems Petitioner Identifies in Capital Cases under Arizona's Current System of Review.

Petitioner identifies various purported problems in Arizona's current system for reviewing capital cases. Closer examination reveals, however, that Petitioner's proposal would fail to alleviate the perceived problems and multiply the complications of capital review.

A. This Court Has Already Found Unitary Review Unworkable.

The Arizona courts briefly employed a review process similar to the one suggested in the proposed amendments. During this time, defendants were directed to seek to stay direct appeal review to pursue post-conviction relief. *See State v. Valdez*, 160 Ariz. 9, 15, 770 P.2d 313, 319 (1989). In 1995, this Court expressly abandoned its prior practice. *Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d 1149, 1151 (1995) (emphasizing that the Court would "almost never allow a Rule 32 proceeding to delay a direct appeal"); *see also State v. Spreitz*, 202 Ariz. 1, 2, 39 P.3d 525, 526 (2002). This Court cited the "unworkable" nature of the process and "long delays" as the reason for abandoning the practice of staying the direct appeal during PCR proceedings. *Id.* (citing *State v. Vickers*, 180 Ariz. 521, 885 P.2d 1086 (1994)).

Petitioner nevertheless asserts that the proposed amendments are necessary to avoid delays occurring under the current Rules. The proposed amendments will significantly increase the time it takes to resolve cases on direct appeal–a prospect this Court found unacceptable in the past–without providing any realistic means of decreasing the time spent on investigation and resolution of PCR proceedings. This Court should not revert to a system it has already found "unworkable."

B. Petitioner's Case Examples Demonstrate that Delay Results from Sources the Proposed Amendments Would Not Resolve.

Petitioner argues that the current procedure for reviewing capital cases "has proven just as unworkable as the prior procedure, if not more so." (Pet. at 3.) In support of this assertion, Petitioner lists ten cases and states that "[o]n average, more than three years pass between the time that the United States Supreme Court denied review of the certiorari petition and the time that a capital Rule 32 petition is filed." (Pet. at 4.) Petitioner's broad overview of these cases is misleading. Petitioner fails to note that, in each case, systemic issues unrelated to the absence of unitary review, including the lack of available qualified counsel, contributed to the passage of time between the denial of certiorari and the filing of the PCR petition. *See* App. A. The same is true of the cases Petitioner includes to demonstrate delay between the crime and the PCR proceedings. Petitioner's proposed changes would not ameliorate any delay in the state review process.

C. Petitioner's Assertion that the Proposed Amendments Will Eliminate the Need for Investigation is Inaccurate.

Petitioner generally argues that the proposed amendments would reduce the time required to file a PCR petition because placing the PCR proceedings closer in time to the trial would eliminate a "perceived need to re-investigate the case anew in the post-conviction setting." (Pet. at 2.) Investigation of the crime, case details, and any mitigating circumstances, however, is essential to an effective PCR process. *See* Ariz. R. Crim. P. 6.8 (requiring PCR counsel to be familiar with and guided by performance standards in the 2003 ABA Guidelines for the Appointment

and Performance of Defense Counsel in Death Penalty Cases); *see also Martinez*, 132 S. Ct. at 1317 ("Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. . . . [M]oreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim." (internal citation omitted)).

PCR counsel has an obligation to raise all claims of trial counsel's ineffectiveness under both Arizona's current PCR scheme and the proposed amendments. *See Spreitz*, 202 Ariz. at 3, 39 P.3d at 527. An evaluation of trial counsel's performance necessitates investigation by PCR counsel. In addition, PCR counsel must investigate to uncover other PCR issues, outside the Sixth Amendment sphere, regardless of the work trial counsel did: without investigation, there would be no vehicle to uncover, for example, newly-discovered evidence or violations of *Brady v. Maryland*, 373 U.S. 83 (1963). Thus, Petitioner's assertions that the proposed amendments will save money and prevent delay are based on a mischaracterization – no change to the order of proceedings can absolve PCR counsel of the duty to investigate anew.

D. Petitioner's Proposal Would Create a Host of Unnecessary Problems Regarding the Appointment and Performance of Counsel.

As described above, much of the delay in capital PCR cases in Arizona has stemmed from delay in the appointment of qualified PCR counsel. *See supra* Section I.B; App. A. Petitioner's proposal, rather than remedying this problem, has the genuine potential to exacerbate it. Unitary review would require an even larger pool of available, qualified PCR attorneys.[1] Petitioner's proposal creates at least two potential complications: first, Arizona courts would be charged with finding and appointing a greater number of qualified counsel in a wider range of proceedings, and, second, they would become responsible for ensuring the Sixth and Fourteenth Amendment effectiveness of PCR counsel.

Arizona's Rules of Criminal Procedure require a significantly different set of qualifications for the appointment of appellate and PCR counsel in capital cases. Most notably, while Rule 6.8 only requires that capital appellate counsel have prior experience as lead counsel in specific types of appeals, it requires that capital PCR counsel have prior experience as lead counsel in trials or PCR evidentiary hearings. *Compare* Ariz. R. Crim. Pro. 6.8 (c)(1), *with* Ariz. R. Crim. P. 6.8(c)(2).

[1] Petitioner's proposal does not address whether the courts would appoint separate counsel for appellate and PCR proceedings, or whether those counsel would be different again from trial counsel. As explained below, *see infra* Section II, appointing separate sets of counsel, as Colorado does, can lead to extensive litigation over inherent conflicts of interest, whereas appointing the same counsel, as Idaho once did, has led the Ninth Circuit Court of Appeals to conclude the state had deprived the prisoner of the opportunity to raise timely Sixth Amendment claims, *Hoffman v. Arave*, 236 F.3d 523, 531-36 (9th Cir. 2001).

Under Arizona's current system of review, direct appeal counsel is responsible for record-based claims. *See generally State v. Carter*, 216 Ariz. 286, 291, 165 P.3d 687, 692 (Ct. App. 2007) ("On appeal, we neither expect nor, in the ordinary case, permit a defendant to offer factual evidence outside the superior court record."). However, Petitioner's proposal not only requires that appellate counsel file a petition for review challenging PCR issues raised in the trial court while representing the client in a consolidated review of all prior issues, but it also requires appellate counsel to "include in the opening brief all colorable claims of ineffective assistance of trial and sentencing counsel *regardless of whether the claims have been raised* in a petition for post-conviction relief or in the petition for review from the denial of post-conviction relief." (App. to Pet. at 3 (changes to Rule 31.13(f)(3)).) Petitioner suggests that appellate counsel would be responsible for the record-based issues available on direct appeal, as well as issues raised during PCR and any other issues related to the effective assistance of counsel regardless of whether they have been raised before.

Thus, the concerns that led the Court to adopt Rule 6.8(c) would dictate that appellate counsel, if responsible for reviewing and challenging the outcome of PCR proceedings and searching for any other potential issues, meet the heightened qualifications currently only required of PCR counsel in capital cases. Should this Court enact the proposed amendments, appellate counsel would be responsible for

reviewing, at a minimum, the trial and PCR proceedings, including investigating the performance of both sets of prior counsel.

Further, adopting the proposed amendments would require this Court to provide and ensure the Sixth and Fourteenth Amendment effectiveness of PCR and petition for review counsel. The Court has relied on the need for finality as a rationale for holding that a defendant has no right to the effective assistance of PCR counsel. *See, e.g.*, *State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996) (internal quotations and citations omitted). This reasoning would no longer have any force under the proposed amendments because placing PCR proceedings before any appeal would mean that the conviction and sentence will not be final at the time of the PCR proceedings. As a result, PCR review would no longer challenge judgments to which there are a presumption of finality, nor would the Court's ultimate review be truly collateral to any final judgment. (*See* App. to Pet. at 2-3, 5.) Under Petitioner's proposal, a person would petition for post-conviction relief before having the constitutionally-required opportunity to bring claims before this Court on direct appeal. *See generally Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (right to effective assistance of counsel during first appeal as of right). Thus, by creating a process by which PCR counsel is responsible for challenging non-final convictions and sentences, this Court would be responsible

for ensuring that PCR counsel performed effectively within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution.

The changes described above would exacerbate both costs and delays. First, the proposed amendments would lead to an immediate need for a larger pool of PCR qualified attorneys, requiring time and funding sufficient to satisfy those needs. Second, the delays and costs associated with litigating, where necessary, the qualifications and effectiveness of an increased number of counsel would upsurge.

E. The Proposed Amendments Are Unnecessary to Resolve Issues Already Addressed by the Rules of This Court.

Petitioner fails to acknowledge that this Court has already adopted rules specifically designed to resolve many of the issues Petitioner identifies. First, this Court has addressed the decreased reliability stemming from the loss of relevant case files by adopting Arizona Rule of Criminal Procedure 6.3(d). That Rule was specifically designed to maintain files and reduce delay. Ariz. R. Crim. Pro. 6.3(d), 2009 cmt. Should Petitioner believe this rule insufficient, there are an array of alternatives for addressing file retention which stop short of re-ordering Arizona's capital review process, and which more aptly address the issue. Arizona could, for example, create a central repository for the retention of files in capital cases. This

would increase the speed and reliability of obtaining case information, without the added problems of unitary review.[2]

Second, Petitioner suggests that "moving the post-conviction review of claims forward . . . will increase the likelihood that the same judge who presided over the trial will preside over the Rule 32 proceeding." (Pet. at 9.) As Petitioner acknowledges, the Arizona Rules of Criminal Procedure already provide that PCR proceedings "shall be assigned to the sentencing judge where possible." Ariz. R. Civ. Pro. 32.4(e). Even assuming for the sake of argument that capital PCR proceedings are "often" heard before a judge different than the sentencing judge, (*see* Pet. at 9), the proposed amendments do not resolve the issue. First, the sentencing judge may be unavailable for a number of reasons unrelated to the passage of time, including conflicts, retirement, or death. Second, delay frequently occurs for reasons that would be unchanged by the proposed amendments. *See* App. A. Further, as detailed below, PCR proceedings in the limited jurisdictions that have adopted unitary review are still subject to the same delay Petitioner decries; accordingly, the proposed amendments would have little if any impact on

[2] Petitioner also speculates that evidence may be lost because witnesses' memories may fade over time, making witnesses less reliable. Witness reliability, however, is inherently fluid, changing, and largely circumstantial. While some witnesses may be more reliable closer in time to trial, other witnesses may actually become more reliable with the passage of time–because, for example, they become distanced from the influences of addiction or past associates. Speculation about witness reliability does not justify adopting the proposed amendments.

whether the same sentencing judge is appointed for PCR proceedings. *See infra*, Section II.

F. The Proposed Amendments Would Reduce Reliability in Capital Cases.

Petitioner suggests various ways in which the proposed amendments would increase the "reliability" of capital review. (*See* Pet. at 7-8.) In fact, review of the proposed amendments indicates that Petitioner embraces changes that would operate to decrease reliability. Petitioner suggests, for example, that PCR counsel should begin work and investigation without the benefit of a compiled record. (Pet. at 9.) This would lead to inefficiency, delay, and potentially decreased reliability. *See Hardy v. United States*, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring) (noting that "the most basic and fundamental tool of [an appellate advocate] is the complete trial transcript," review of which may lead to the discovery of "an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law"); *see also* ABA Death Penalty Due Process Project and Texas Capital Punishment Assessment Team, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report at 217-18 (Sept. 2013); *see infra* Section II.

The proposed amendments would further exacerbate the risks to reliability by changing the time limits in PCR cases. (*See* App. to Pet. at 4 (changes to Rule 32.4(c)).) Under the proposed amendments, capital defendants will have 270 days,

rather than 12 months, to file the petition once the record is complete. (*See id.*) Arizona's current review process recognizes that PCR proceedings, regardless of their place in the line of review, inherently require significant time to prepare and complete. In Arizona, extensions of time in capital cases are not granted absent a superior court finding good cause. Imposing shortened deadlines endangers the reliability of those proceedings. Giving capital petitioners less time than non-capital petitioners makes little sense in furthering reliable review.

The promise of increased reliability means little if defendants are not represented by qualified PCR counsel with adequate time and resources to investigate and prepare potential claims. *See Hoffman*, 236 F.3d at 531-36. The proposed amendments attempt to shorten the amount of time capital defendants have to complete PCR proceedings while simultaneously seeking to insulate from federal review the work of ineffective PCR counsel.

II. Similar Systems in Other States Have Increased Delays and Proved Cumbersome and Unworkable.

Before wading into the quagmire Petitioner proposes, this Court should look to experiences with unitary review in other jurisdictions that cast doubt on whether unitary review would expedite capital proceedings and demonstrate that it can interfere with the "careful review purportedly demanded in death penalty cases." *See* Joan M. Fisher, *Expedited Review of Capital Post-Conviction Claims: Idaho's Flawed Process*, 2 J. App. Prac. & Process 85, 87 (2000).

Two examples highlight the problems inherent in unitary review. In 1997, Colorado began using a unitary review system similar to the proposed amendments. Colo. Rev. Stat. § 16-12-203 (1997); Colo. R. Crim. Pro. 32.2 (2012). However, the practical effect has been "to delay the filing of a direct appeal for several years." Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. Denver Crim. L. Rev. 145, 154 n.38 (2013). What is more, Colorado's experience foreshadows the myriad conflicts of interest the proposed amendments necessarily entail.

In the first of Colorado's capital cases to proceed under its unitary review system, the Colorado Supreme Court stated that "the unprecedented size of the record, numerous ongoing delays in making the record available to counsel, and substantial delays in getting conflict-free counsel appointed" resulted in "a real possibility of requests for extension of time" beyond two years. *People v. Owens*, 228 P.3d 969, 970 (Colo. 2010). The Court concluded that rules permitting extensions beyond two years were consistent with the goals of avoiding delay, "because . . . any failure of the state judiciary to prevent or rectify constitutional deficiencies, quite apart from amounting to a dereliction in itself, would simply leave the matter for subsequent federal correction, resulting in even greater delays." *Id.* at 972.

Second, Colorado's unitary review system provides for the appointment of two separate sets of counsel for appellate and PCR representation and has resulted in conflicts and litigation between counsel. In the case described above, one set of the petitioner's counsel alleged that unitary review "draws the two sets of Sixth Amendment attorneys retained . . . into irresolvable conflicts, and 'pits' them against each other." *See Owens v. Ofc. of the Dist. Atty. for the Eighteenth Judicial Dist.*, 896 F. Supp. 2d 1003, 1007 (D. Colo. 2012). The federal court explained some of the issues as follows:

> [F]or post-conviction counsel to prosecute the claims of ineffective assistance of trial counsel, they must make every colorable claim that counsel failed to preserve important issues. As part of this duty, post-conviction counsel has been directed to turn over to the government materials subject to the attorney client privilege from trial counsel's files that support their claims. This purportedly creates a conflict with direct appeal counsel who assert that disclosure of the privileged material to the government will irreparably harm [petitioner's] direct appeal.

Id. Although the court ultimately abstained from deciding the case under *Younger v. Harris*, 401 U.S. 37 (1971), the details of the action nevertheless provide another example of the complex and time-consuming problems created by unitary review. Instead of eliminating delays, Colorado's unitary review system has exacerbated them and led to extensive litigation.

Idaho enacted unitary review in 1984. Idaho Code Ann. § 19-2719 (1984) (current version at Idaho Code Ann. § 19-2719 (2010)). Examining a sampling of cases litigated under Idaho's unitary review system reveals that it has not eliminated delay. *See* App. B. What is more, cases are delayed further by based on issues that may not have arisen without a unitary review system, or that could have been resolved on direct appeal alone. App. B.

In addition, the Ninth Circuit Court of Appeals found that Idaho's unitary review system frustrated the exercise of a petitioner's Sixth Amendment claims, and "effectively prevented [him] from timely raising his ineffective assistance of counsel claims." *Hoffman*, 236 F.3d at 531-36. Indeed, the Ninth Circuit, noting Idaho was in a small minority of unitary review jurisdictions, found the parameters of its system–including the failure to appoint independent counsel, unduly harsh time limits, and forcing counsel to proceed without a prepared record–infected the system with such unfairness that the state courts' procedural bars deserved no federal deference. *Id.*

As these examples from other jurisdictions demonstrate, unitary review infects an appellate system with uncertainty and conflict. This increases costs, unreliability, and delay, and creates additional, otherwise unnecessary litigation.

III. Petitioner's Proposed Amendments Attempt to Limit Protection Extended to the Constitutional Rights of Capital Defendants.

In *Martinez*, 132 S. Ct. 1309, the United States Supreme Court created an equitable remedy for federal habeas corpus petitioners who received ineffective assistance from their state PCR counsel. Prior to *Martinez*, capital defendants had no remedy in state or federal court when PCR counsel failed to raise colorable claims during state PCR proceedings; those claims were procedurally defaulted and could not be considered by the federal courts. *Martinez*, 132 S. Ct. at 1316 (recognizing that without this equitable remedy, if counsel in an initial-review collateral proceeding fails to raise a claim, "no court will review the prisoner's claims"). Petitioner asserts that these proposed amendments "will address the concerns implicated in *Martinez*," but does not explain how that is so. (Pet. at 10.)

The *Martinez* Court stressed that "[t]he right to effective assistance of counsel at trial is a bedrock principle in our justice system," and "the foundation for our adversary system." *Id.* at 1317. Accordingly, the ability to present a claim of trial error is of grave importance. In *Martinez*, the Court stated that initial-review collateral proceedings are "in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim," 132 S. Ct. at 1317, and noted that by requiring trial ineffective-assistance claims to be raised in such collateral proceedings, states have chosen to move them outside the framework where counsel is constitutionally guaranteed, *id.* at 1318. Accordingly, the Court created an equitable remedy to provide capital defendants with a vehicle for overcoming

the result of ineffective representation during proceedings that constitute the first opportunity to raise claims of ineffective assistance of counsel at trial. *Id.*

Petitioner argues that the proposed amendments will remove the "initial collateral proceeding," and "allow for direct review of all claims of ineffective assistance of counsel whether raised in the post-conviction proceeding or on direct review," eliminating the "procedural framework" discussed in *Martinez*. (Pet. at 10.) But Petitioner misses the point of *Martinez*, which is not based on a specific "procedural framework," but on a capital defendant's need to have effective representation when raising claims of trial ineffectiveness. *See, e.g.*, *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (extending *Martinez* to those states that do not provide capital defendants with a "meaningful opportunity to raise a claim of ineffective assistance of counsel on direct appeal"); *see also Martinez*, 132 S. Ct. at 1318 (noting that Arizona had "sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral review stage"). That need for effective representation exists regardless of the specific order of proceedings, and Petitioner will not insulate itself from litigating claims in federal court that PCR counsel was ineffective simply by moving the proceeding with an ineffective lawyer to a different time in the process. In fact, by proposing to integrate the PCR proceeding with the direct appeal, Petitioner is creating a

constitutional, rather than simply an equitable, right to the effective assistance of counsel during the PCR proceedings.

IV. The Proposed Amendments Will Increase the Costs of Review of Capital Cases in Arizona.

The proposed amendments will increase the costs of review in capital cases. Petitioner has anticipated this problem with the proposed amendments, (Pet. at 11-13), but has offered no specific data to refute the point or any solutions to resolve the problem. Petitioner, through generalities, asks this Court to assume that it will rarely, perhaps never, grant direct appeal relief in capital cases. This assumption is simply no basis for ignoring the increased and potentially unnecessary costs of unitary review. This Court should not accept Petitioner's bare assertion that there is little to no chance that future cases may merit direct appeal relief. Further, as Idaho's example portends, unitary review has in fact resulted in states spending money to complete PCR proceedings when the courts have decided cases based upon issues that could have been resolved on direct appeal alone.

Conclusion

The proposed amendments are aimed at a problem not before this Court: the application of *Martinez* in federal habeas review. Rather than work within the parameters of that precedent in federal court, Petitioner comes to this Court seeking to upturn the entire state system of capital review. Petitioner points to state problems that have either been addressed or should be addressed in alternative

manners, and offers a solution that would exacerbate those problems. This Court should decline to accept these sweeping and overly broad proposals, and allow Arizona's capital review system to continue improving along its current course.

Respectfully submitted this 15th day of April, 2014.

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Certificate of Service

I hereby certify that on April 15, 2014, I electronically filed the foregoing with the Arizona Supreme Court by using the Court Rules Forum website. I certify that Petitioner will be served with a copy of the comment via email as allowed by Arizona Supreme Court Rule 28(D)(2).

s/Robin Stoltze
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