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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

ADDITIONAL COMMENT TO
PETITION TO AMEND RULES

The Arizona Attorney General’s Office proposes several amendments to the Arizona Rules of Criminal Procedure. For the reasons described below, the reasons discussed by this office in previous comments, and the reasons described in comments filed by the State Bar of Arizona, the Maricopa County Public Defender’s Office, and the Arizona Attorneys for Criminal Justice (“AACJ”), the Office of the Federal Public Defender for the District of Arizona (“FPD”) respectfully urges the Court to deny the proposed rule change petition.

Background

After a modified comment period and the opportunity to amend its proposal, the Arizona Attorney General proposes a group of changes to Arizona Rules of Criminal Procedure 31 and 32, which principally involve adoption of a system of “unitary review” in capital cases. The changes include: completing post-conviction proceedings in the superior court before this Court reviews any part of the case, changing the time and word limits for appellate and petition-for-review briefing; changing the time limits and standards for extensions for post-conviction petitions; and imposing time limits on the decisions of the superior court.

Along with several other entities, including the State Bar of Arizona, the Office of the Legal Advocate for Maricopa County, and AACJ, the FPD opposed the proposed changes and detailed the reasons for doing so in multiple comments to this Court.¹ This Court then reopened the matter for additional comments regarding the use of unitary review systems in other states. The FPD continues to oppose the changes, and agrees with the reasoning given in each of the various comments in opposition. To avoid repetition of points already argued, the FPD

¹ Petitioners note in the most recent amendment to their petition that in the initial comment period, only two comments were filed. (See Amended Petition filed Jan. 10, 2015 at 1.) They fail to note that in subsequent comment periods, other interested and affected parties either joined the FPD comment or filed comments of their own. Because a large number of attorneys that handle capital direct appeals and post-conviction cases are sole practitioners, many have relied on comments submitted by the FPD and/or AACJ to represent their views.

relies on its previous comments and submits this comment limited to three issues regarding the topic specified by the Court when re-opening the comment period.

I. The most recent amended petition fails to respond to the questions posed by the Court, and fails to provide any evidentiary support for Petitioner's allegations.

Throughout the amended petition filed by Petitioner on January 10, 2015, Petitioner simply repeats the same arguments it has relied on since its reply in the initial comment period, without providing new information or responding to other arguments. For example, Petitioner argues that these changes are intended to make capital proceedings more “reliable.” (Am. Pet. at 2.) However, it has failed to offer any evidentiary support for that allegation. While Petitioner has expanded somewhat its argument that the information presented by the FPD regarding the failures of similar systems in Idaho and Colorado would not apply to such a system in Arizona (Am. Pet. at 15-18), it does not provide any statistical, factual, or even anecdotal evidence that this is true.

In addition, several other statements repeated by Petitioner also lack evidence or are demonstrably incorrect. Petitioner argues that a single paragraph from a motion filed in one capital post-conviction case is enough to show that the proposed system would be an improvement over the current system. (Am. Pet. at 4-5.) However, the paragraph cited by Petitioner does not argue that the time spent on direct appeal was problematic; the “extraordinary” delay noted by counsel

refers to the 1062 days that Mr. Garza spent waiting for appointment of PCR counsel after the appeal had been decided. As noted in previous FPD comments and acknowledged by Petitioner (Am. Pet. at 8), the proposed changes do not address this aspect of delay in Arizona's post-conviction process. Petitioner also fails to address how such a delay in a future case would affect the changes it proposes. And, Petitioner does not explain how the specific problems in *Garza* would have been different under its proposal; it is not clear from the quoted section exactly what problems Mr. Garza's counsel faced in working up that case, making Petitioner's discussion of limited utility.

Petitioner also argues that previous FPD comments misapprehend both the need for more qualified attorneys under the proposed system, and the role of the Sixth Amendment. Both arguments are incorrect. First, the previous FPD comments explain in detail why heightened qualifications for appellate counsel are necessary. Arizona Rule of Criminal Procedure 6.8 imposes different qualification requirements for those appointed to represent clients on appeal or in post-conviction proceedings. If, as Petitioner acknowledges, appellate counsel is responsible for reviewing the post-conviction record and for raising record-based claims for post-conviction relief not raised in the superior court, such counsel must not only meet the Rule 6.8 requirements for appellate counsel, but also the Rule 6.8 requirements for post-conviction counsel.

And, while Petitioner is correct that the Sixth Amendment right to effective assistance of counsel is limited to the performance of trial counsel, it fails to acknowledge that the Fourteenth Amendment confers the same right on appeal. *Evitts v. Lucey*, 469 U.S. 387, 397 (1985). And, although the FPD obviously agrees that no court has yet found a constitutional right to effective assistance of counsel in collateral proceedings, Petitioner ignores two points. First, that *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012), both emphasized the important role of post-conviction counsel in vindicating a defendant’s Sixth Amendment right to counsel, and stated that such a role in collateral proceedings was “in many ways,” equivalent to an appeal for claims that cannot be raised in a previous proceeding. Based on these principles, the Court did not go so far as to recognize a constitutional right, but did create an equitable remedy for those who received ineffective assistance of post-conviction counsel. However, the distinction here is that *Martinez* was based on Arizona’s collateral system for post-conviction proceedings, instead of the system proposed by Petitioner here which would move post-conviction proceedings from a *collateral* role to an appellate one. Under those circumstances, there is no finality interest to protect because the case is not final at the time the post-conviction proceedings take place. Thus, the Fourteenth Amendment right to effective assistance of counsel would likewise apply.

Finally, in the amended petition Petitioner argues that the time limits imposed by its proposal would “prevent” delays like those that occurred when Arizona had a similar system in previous years. (Am. Pet. at 6.) Petitioner argues that in providing an “additional sixty days” for appellate counsel to both review the post-conviction record and to “include in the opening brief any additional, record-based post-conviction issues.” (Am. Pet. at 6.) Petitioner provides no evidence that this is sufficient time for these tasks to be completed, and makes no provision for additional time if necessary.² Petitioner likewise argues that the proposal provides the same time limit of thirty days for filing the petition of review, without acknowledging that the thirty-day time limit in the current system is extended at least once in almost every capital case (and in many cases, extended several times), upon a court finding that the extensions are necessary and reasonable. Petitioner points to no evidence from Arizona or other jurisdictions that the proposed reforms would be workable in practice or actually reduce delay, and does not explain how the contrary experience in Colorado and Idaho can be distinguished from the proposed changes here.

² In fact, Petitioner’s proposal seemingly makes no provision or consideration for extensions or judicial delays necessary for reasons outside those affecting a specific case. As any judge or practicing lawyer knows, extensions of time become necessary for a host of reasons not related to the case in which an extension is requested or a decision is delayed, including caseloads and personal circumstances. Instead, the proposal imposes arbitrary time limits as to what Petitioner considers “reasonable” or “adequate” to perform specific tasks or render decisions without consideration of any outside events or responsibilities.

In fact, throughout the proposal, Petitioner imposes strict time limits on defense counsel and the courts without any evidence that those time limits are workable or reasonable, aside from its own assertions of reasonableness. As Petitioner is the party prosecuting nearly all capital appeals and post-conviction cases, without evidence supporting its proposed sweeping changes to the roles of opposing counsel and the courts, it is difficult to understand how the system would be fair and equitable to all involved parties rather than simply a boon to the prosecution. Instead, the proposal unilaterally removes judicial discretion and defense autonomy throughout the appellate process without providing any type of failsafe for varying circumstances in a specific case.³

II. Petitioner’s attempt to distinguish the experiences that both Colorado and Idaho have experience under unitary review proceedings is unconvincing and lacking evidentiary support.

Petitioner argues that the problems experienced by Colorado and Idaho are not as “drastic” as FPD comments have suggested (Am. Pet. at 16), but it provides

³ Similarly, Petitioner’s attempt to distinguish the proposed changes from the “unworkable” system Arizona abandoned more than twenty years ago lacks evidentiary support from Arizona practice or that employed by other states with a similar unitary review system. (Am. Pet. at 10.) Petitioner simply again argues that its proposal provides an “adequate” time frame and “reasonable” time limits without any support for those arguments. Petitioner also fails to explain how the fact that this proposal applies only to capital cases somehow makes it more workable than the abandoned system. Even if non-capital cases continue in the current system, those cases will still require representation by defense attorneys and decisions by judges regardless of the order of proceedings, each of which affects the time available for capital case proceedings.

no support for those allegations. Petitioner does not include cases with contrary experiences or rebut explanations by counsel in those states as to why the unitary review system has been fraught with problems and delays. First, Petitioner argues that the delays experienced in *People v. Owens (II)*, 228 P.3d 969 (Colo. 2010), are inapplicable to Arizona. (*Id.*) Petitioner emphasizes court language stating that the delays were occasioned by the large size of the trial file, delays in providing the record to subsequent counsel, and delays in procuring conflict-free counsel. (*Id.*) But, Petitioner does not go on to explain how those same problems would not occur in Arizona. In fact, two of those reasons for delay are those cited by Petitioner as justifications for the proposed changes, so it is unclear how Petitioner believes that the *Owens* opinion is helpful to its position. Likewise, Petitioner notes that the delays were occasioned because Colorado Supreme Court allowed a trial court to permit extensions for extraordinary circumstances, while going on to note that its proposal does the same.

Petitioner also attempts to dismiss the lawsuits filed by counsel in *Owens* regarding conflicts as “specious.” (Am. Pet. at 17.) Petitioners do not address the specific concerns of counsel in the *Owens* case regarding the conflicts inherent in Colorado’s system. At the most basic level, conflicts arose because claims raised by appellate counsel and post-conviction counsel were in direct opposition to each other, to the client’s detriment. For example, if appellate counsel were to raise a

claim arguing that the claim had been preserved by trial counsel, a direct conflict would arise if post-conviction counsel were to disagree and argue that trial counsel was ineffective for failing to object or preserve the issue. In Arizona's current system, post-conviction counsel can rely on this Court's conclusions as to whether appellate claims were adequately preserved—if this Court instead reviews for fundamental error, a post-conviction lawyer can easily recognize a possible ground for an ineffectiveness claim. And, if appellate counsel and post-conviction counsel are both working with the client, additional conflicts arise if they do not agree as to the important issues or theory of the case, or have different ideas as to confidentiality or privilege. They could provide conflicting advice to the client, or fail to cooperate with each other as contemplated by the proposed changes. Or, post-conviction counsel could be investigating a witness to undermine the witness's credibility, while appellate counsel is relying on the witness's credibility to support crucial appellate claims. These problems between counsel are not only possible, but highly likely under Petitioner's proposal, and Colorado's experience demonstrates that.

Petitioner's discussion of the Idaho system is equally lacking in support and unconvincing. First, Petitioner attempts to distinguish the Idaho experience as discussed in *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), because Idaho subsequently revised its system to address some of the problems experienced in

that case. It is not clear how this helps Petitioner, when its proposal imposes similar time limits and presents the same potential problems as described in *Hoffman*. While it is true that Arizona does not allow for appointment of the same lawyer to represent a client in multiple proceedings without some type of waiver, that part of Idaho's system was not the only reason for the delays or for the fact that the petitioner received merits consideration of his ineffectiveness claims in federal court based on defects in the state proceedings. And, Petitioner disposes of the four other cases discussing problems in Idaho by arguing that in addition to "benefits" to the prisoners from law decided while cases were not final, Arizona would have a "more reliable, complete record and a more timely proceeding." It is hard to see how these are benefits to anyone. Prisoners already get the benefit of changes in the law that occur before their cases are final,⁴ and as discussed above, Petitioner has provided no actual evidence, despite filing an initial petition, a reply, and two amended petitions in support of its proposal, that the proposed changes would result in a system that was more "reliable," "complete," or "timely."

⁴ Petitioner seems to be arguing that the benefit would arise because while cases in the current system become final after certiorari is denied from the direct appeal, the proposed changes would not result in finality until after the combined appeal and petition for review was decided. However, based on the strict time limits and the simultaneous running of the appeal and post-conviction proceeding in Petitioner's proposal, it is difficult to see how prisoners would receive any additional benefit absent delays in a revised system.

III. Petitioner’s proposal was part of a wave of sweeping attempts in 2014 to alter the death-penalty process in multiple states – every other state has already declined to adopt the proposed measures.

As described in this office’s prior comments, the Arizona Attorney General has already unsuccessfully proposed legislation for this same purpose to the Arizona State Legislature. After the legislature failed to pass the suggested amendments, the Attorney General turned to this Court to propose the same changes. This proposal is one among several in other jurisdictions aimed at changing the processes and reducing the time available to seek relief in capital cases. As discussed below, each of the other jurisdictions contemplating such measures in 2014 rejected the proposals, and this Court should do the same.

Alabama

Approximately five days after the Arizona Attorney General filed its current proposal with this Court, Alabama legislators proposed a set of changes, dubbed the “Fair Justice Act,” to its rules of criminal procedure. (Exs. A, B.) The proposed act, like Petitioner’s proposal here, sought to adopt a system of unitary review in capital cases, change the timing of capital proceedings, and increase the number of enumerated capital offenses. The proposals made it out of the respective House and Senate Judiciary Committees, and underwent a joint House and Senate hearing. *See ACLU of Alabama Challenges the Proposed “Fair Justice Act,”* Alabama Political Reporter, <http://www.alreporter.com/archives/319-archive-2014/2014-january/>

5667-aclu-of-alabama-challenges-the-proposed-fair-justice-act.html (last visited Jan. 13, 2015). The proposal then died without passing either body of the legislature. See LegiScan, *Bill Texts: AL SB194 2014 Regular Session*, <http://legiscan.com/AL/drafts/SB194/2014> (last visited Jan. 13, 2015); LegiScan, *Bill Texts: AL HB216 2014 Regular Session*, <http://legiscan.com/AL/bill/HB216/2014> (last visited Jan. 13, 2015).

California

In California, three former governors proposed a ballot initiative to, among other things, limit appeals available in capital cases. (Ex. C.) See Associated Press, *Call to Speed Up California's Death Penalty Process*, Al Jazeera America (Feb. 14, 2014), <http://america.aljazeera.com/articles/2014/2/14/ex-governors-callfor-californiadealthpenaltyreform.html> (last visited Jan. 13, 2015). The California Secretary of State suggested a deadline of April 2014 for collecting signatures to put the measure on the ballot, but in May supporters announced they would postpone attempting to put the initiative on the ballot until 2016. See Ballotpedia, *California "Death Penalty Reform and Savings" Initiative (2014)*, [http://ballotpedia.org/California_%22Death_Penalty_Reform_and_Savings%22_Initiative_\(2014\)](http://ballotpedia.org/California_%22Death_Penalty_Reform_and_Savings%22_Initiative_(2014)) (last visited Jan. 13, 2015); see also CBS Los Angeles, *Death-Penalty Reform Initiative Pushed to 2016*, <http://losangeles.cbslocal.com/>

2014/05/10/death-penalty-reform-initiative-pushed-to-2016/ (last visited Jan. 13, 2015).

Kansas

In January 2014, Senate Bill 257 was introduced in a detailed effort to make a multitude of changes to capital proceedings in Kansas. (Ex. D.) The proposal included changes to the time limits, court decisions, and remedies available in capital cases. The Senate held a hearing on the proposal the same month, but the proposal died in committee in May 2014. *See* LegiScan, *KS SB257 2013-2014 Regular Session*, <http://legiscan.com/KS/bill/SB257/2013> (last visited Jan. 13, 2015).

Tennessee

In January 2014, Tennessee state legislators proposed far-reaching changes to state law that would change oversight of the courts, require judges to meet set deadlines in capital cases without the ability to extend them, change the timing of state capital cases, and force lawyers representing indigent defendants to reimburse the state if they were later found to have been ineffective. (Exs. E, F.) *See also* Andrew Cohen, *Welcome to Tennessee, where lawmakers are trying to kneecap judges*, *The Week*, <http://theweek.com/articles/452140/welcome-tennessee-law-makers-are-trying-kneecap-judges> (last visited Jan. 13, 2015). The bills died in committee in the Senate and in chamber in the House. *See* LegiScan, *TN SB2322*

2013-2014 108th General Assembly, <http://legiscan.com/TN/bill/SB2322/2013> (last visited Jan. 13, 2015); LegiScan, *TN HB2466 2013-2014 108th General Assembly*, <http://legiscan.com/TN/bill/HB2466/2013> (last visited Jan. 13, 2015).

Louisiana

In March 2014, a Louisiana Representative proposed entirely repealing Code of Criminal Procedure Article 930.8(A)(4), which provided exceptions for time limits on filing petitions for post-conviction relief. (Ex. G.) The Legislative Fiscal Office noted the proposal “may result in an indeterminable increase in the workload of the various public defenders representing these death row inmates.” (Ex. H.) The proposed bill died in committee. *See* LegiScan, *LA HB71 2014 Regular Session*, <http://legiscan.com/LA/bill/HB71/2014> (last visited Jan. 13, 2015).

Missouri

In February 2014, fifteen Missouri state senators introduced a bill intended to hasten executions in death-penalty cases where a defendant is convicted of both kidnapping and murder. (Ex. I.) Like Petitioner’s proposal here, the bill heightened the standards for extensions of time, and mandated strict deadlines for courts to rule in pending cases. The Missouri State Bar opposed the bill, noting due process concerns and opposing the attempt to usurp judicial discretion. (Ex. J.) A hearing on the bill was conducted by the Civil and Criminal Jurisprudence

Committee in April 2014, but died in committee and has not been reintroduced in 2015. *See* LegiScan, *MO SB945 2014 Regular Session*, <http://legiscan.com/MO/bill/SB945/2014> (last visited Jan. 15, 2015).

Colorado

As described in detail in prior comments in opposition, Colorado already attempts to use a unitary review system in some of its capital cases. Despite the problems inherent in the current system (or perhaps because of them), in January 2014, a Colorado legislator introduced a bill to the Senate dubbed the “Swift Justice Act,” intended to limit the time available to complete capital appeals. (Ex. K.) The bill died in chamber. *See* LegiScan, *CO SB069 2014 Regular Session*, <http://legiscan.com/CO/bill/SB069/2014> (last visited Jan. 13, 2015).

Conclusion

A more comprehensive discussion of the unsurmountable problems with Petitioner’s proposal is available in prior comments in opposition. The office continues to support those reasons and respectfully asks the Court to carefully consider those problems. And, as noted above, Arizona is the last in a list of states still considering various attempts made in 2014 to limit defendants’ rights, which have been proposed in the name of hastening death-penalty cases to their conclusion. Arizona should not only look carefully to the examples of the few other states using unitary review, but also to the list of states which have declined

to adopt these hasty measures. For all of these reasons, the office respectfully asks this Court to decline to adopt Petitioner's proposed rule changes.

Respectfully submitted this 16th day of January, 2015.

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By s/ Jennifer Y. Garcia
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Certificate of Service

I hereby certify that on January 16, 2015, 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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